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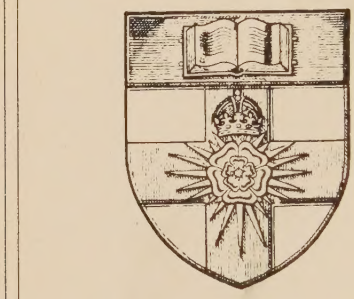

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IN

THE KING'S BENCH DIVISIONS

OF

THE HIGH COURTS OF JUSTICE,

AND ON APPEAL THEREFROM IN

THE COURTS OF APPEAL

IN THE IRISH FREE STATE

AND

IN NORTHERN IRELAND.

EDITED BY

T. HENRY MAXWELL,

ONE OF HIS MAJESTY'S COUNSEL.

1923.

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Lords Justices of Appeal.

(IN THE IRISH FREE STATE.)

The Right Hon. Stephen Ronan.

The Right Hon. James O'Connor.

(IN NORTHERN IRELAND.)

The Right Hon. William Moore.

The Hon. James Andrews.

King's Bench Division.

(IN THE IRISH FREE STATE.)

The Right Hon. Thomas Francis Molony, C.J. (Ir.)

The Right Hon. William Houston Dodd.

The Right Hon. Jonathan Pim.

The Right Hon. Arthur Warren Samuels.

(IN NORTHERN IRELAND.)

The Right Hon. Sir Denis Stanislaus Henry, Bart., C.J.

The Right Hon. Thomas Walters Brown.

Irish Land Commission.

The Hon. William E. Wylie.

Attorney-General.

(IN THE IRISH FREE STATE.)

Hugh Kennedy K.C.

(IN NORTHERN IRELAND.)

The Right Hon. Richard Best K.C.

[These Reports will be cited as follows :—[1923] 2 I. R.]

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King's Bench Division (*Nisi Prius and Probate*),	T. C. Tobias, . . . Hector Hughes, .	Barristers-at-law.
King's Bench Division (*Bankruptcy*),	C. Norman Kough,	Barrister-at-Law.

(IN NORTHERN IRELAND.)

James M'Connell, Barrister-at-Law.

ERRATUM.

Page 7, line 17, for "the poor rate" read "income tax".

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CASES

DETERMINED BY

THE KING'S BENCH DIVISIONS

OF

THE HIGH COURTS OF JUSTICE,

AND ON APPEAL THEREFROM IN

THE COURTS OF APPEAL

IN

THE IRISH FREE STATE AND IN NORTHERN IRELAND.

1923.

JACKSON *v.* STOPFORD AND ANOTHER (1).

Gordon J.
1921.
Nov. 21.
Dec. 20.

Landlord and tenant—Rates and taxes—Poor-rate—Lease at a fixed rent—Covenant that lessee is to hold premises "free of all rates, taxes, and assessments"—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *sect.* 52, *sub-s.* 2—*Rectification of lease—Cancellation.*

By an indenture of lease dated the 29th December, 1913, made in pursuance of a prior agreement, the lessees agreed to take from the lessor certain premises for a term of twenty-one years from the 1st September, 1913, at the yearly rent of £250. The lease contained a covenant that "the lessor shall during the said term pay and discharge all rates, taxes, assessments, and outgoings of every nature and kind payable out of or in respect of said premises and lands, it being the true intent and meaning hereof that the lessees shall . . . hold the said premises . . . free of all rates, taxes, and assessments . . . on payment of said reserved yearly rent of £250."

In an action for one year's rent brought by the plaintiff, the defendants claimed to have paid £62 8*s.* 8*d.* in respect of rates, and brought the balance of the year's rent, £187 11*s.* 4*d.*, into Court in satisfaction of the plaintiff's claim.

In the alternative the defendants claimed to set off £62 8*s.* 8*d.* against the plaintiff's claim on foot of the plaintiff's covenant to indemnify them against rates, and also counterclaimed to have the lease rectified by making it embody the alleged agreement, or otherwise cancelled.

Held, by the High Court of Appeal, affirming the decision of the Court of Appeal in Southern Ireland and the judgment of Gordon J., that the Court cannot rectify or cancel a deed or agreement because its terms operate differently from what the parties intended owing to their mistake as to the general law applicable to the transaction. Rectification is only applicable to a case in which there is an agreement and a subsequent failure to express it as made.

(1) Before GORDON J. without a jury.

Gordon J.
1921.
JACKSON
v.
STOPFORD.

TRIAL OF ACTION.

This was an action for the recovery of the sum of £250, being one year's rent to 1st September, 1921, of certain lands and premises situated near Midleton, in the County of Cork. The terms of the letting, the nature of the pleadings, and the facts of the case appear sufficiently for the purposes of this report from the judgment of Gordon J., by whom the action was tried without a jury.

Gibson K.C. and *Rearden*, for the plaintiff.

Jellett K.C. and *Conner K.C.* (with them *O'Donoghue*), for the defendants.

[Authorities cited and discussed:—*Gaskell* v. *King* (1); *Bradshaw* v. *M'Mullan* (2); Halsbury's Laws of England, vol. xxi, p. 4, pars. 7 and 12; *Wake* v. *Harrop* (3); *Cooper* v. *Phibbs* (4); *Hood* v. *Mackinnon* (5); *Booth* v. *Booth* (6); *Blount* v. *Blount* (7); the Income Tax Act (1918), sect. 23; *Burroughs* v. *Abbott* (8); *Barcroft* v. *Willand* (9): Storey on Equity, 1892 edn., sec. 164 (*c*); *Powell* v. *Smith* (10); Encl. of Laws of England, vol. ix, p. 274.]

Cur. adv. vult.

Dec. 20.

GORDON J.:—

The claim in this action is for £250, being one year's rent to 1st September, 1921, of certain lands and houses thereon, due under a lease for twenty-one years from 1st September, 1913, made by the plaintiff to the defendants on 29th December, 1913. The making of the lease is admitted, that the defendants are now and have been since the execution of the lease in occupation of the demised premises, and that, subject to the questions I have to deal with, the year's rent is due. The real dispute, put shortly, is whether it is the plaintiff or the defendants who is or are liable for the poor-rate payable in respect of the premises. In accordance with the terms of the lease, the plaintiff would be liable for these rates, but her contention is that notwithstanding the terms of the lease the defendants are in point of law liable for these rates. The defendants say that prior to the execution of the lease it was agreed between them and the plaintiff that the lease should contain such terms, provisions, and covenants as would ensure that the annual sum payable by them should not, after taking into consideration all rates and taxes payable by the defendants, exceed the sum of £250 per annum, and that the lease should be prepared so that in no circumstances should the defendants be liable for more than the £250; and that by way of carrying out this agreement the lease was prepared and approved of by the solicitors for the plaintiff and the defendants in the belief that it carried out this agreement, and that it was so acted upon by the plaintiff and the defendants till this year, when

(1) 11 W. N. 165.
(2) [1918] 2 I. R. 249; [1920] 2 I. R. 412.
(3) 1 H. & C. 202.
(4) L. R. 2 H. L. 149.
(5) [1909] 1 Ch. 481.
(6) W. N. (5th Nov., 1921).
(7) [1916] 1 K. B. 230.
(8) [1921] W. R. 336.
(9) 12 L. R. Ir. 35.
(10) 14 L. R. Ir. Eq. 85.

the plaintiff repudiated the agreement so far as it relates to her paying these rates. The defendants also say that they have paid £62 8*s.* 8*d.* in respect of these rates, and that they were always willing to pay the balance of £187 11*s.* 4*d.*, and they bring this sum into Court. As an alternative claim, they say that by the lease the plaintiff covenanted to indemnify them against the payment of any rates, taxes, charges, or assessments leviable on the demised premises, that they have been compelled to pay £62 8*s.* 8*d.* for rates, and ask to set this off against the rent due. The defendants also counterclaim to have the lease rectified by making it embody the alleged agreement, or to have it cancelled, and they ask for £62 8*s.* 8*d.* as damages for breach of contract of indemnity to which I have referred. The plaintiff traverses all these allegations, and relies upon the provisions of the Statute 61 & 62 Vict. c. 37, sect. 52, sub-s. 2—the Local Government (Ireland) Act, 1898.

Dealing with the claim, apart from the counterclaim and the equitable defence as to the lease not being in accordance with the alleged agreement, I think very little difficulty arises. The lease as it stands contains a covenant by the defendants to pay the yearly rent of £250 by equal half-yearly payments on 1st March and 1st September, free of all rates, taxes, and assessments, which are to be paid by the lessor (the plaintiff), and a covenant by the lessor to pay all rates and taxes, assessments, and outgoings of every nature and kind, the true intent being that the lessor shall, during the term, hold the premises free of all rates, taxes, and assessments on payment of the yearly rent of £250. Nothing could on the terms of the lease be clearer or more specific than that the lessor should pay all rates and taxes, and that the lessees should not have to pay more than £250 a year. But sect. 52, sub-s. 2, of the Local Government Act, 1898, has enacted that the poor-rate shall be made upon the occupier, and not upon the landlord, of a hereditament, and that the occupier shall not be entitled to deduct any part of it from his rent, and that any contract respecting such deduction shall be void. And Lord Finlay, in *Bradshaw* v. *M'Mullan* (1), says: "'A contract respecting such deduction' refers not merely to a contract that the machinery of deduction shall be used to indemnify the occupier, but includes all methods of throwing upon the lessor the burden of the rates which the Act throws upon the occupier. 'Such deduction' as used in sub-s. 2 denotes not merely the use of the machinery of deduction; it denotes the sum which is not to be deducted, and a contract that an occupier should have a right of set-off against his lessor in respect of payment of the rate, or a right to be indemnified by his lessor in respect of the payment, falls within the words of avoidance. It follows that as the stipulation that the tenant was to have the premises rate free is void, the appellant, in spite of the bargain which was made, is legally entitled to treat it as a nullity, and to claim the rent, leaving the occupier to bear the rate in addition." Every word of this applies to the present case, and, unless the defendants are entitled to the equitable relief they claim, the plaintiff is entitled to the full amount sued for. *Gaskell* v. *King* (2) shows that the covenant to pay the rent stands, though the covenant to pay the

(1) [1920] 2 I.R., at p. 415.

(2) 2 East, 165.

Gordon J.
1921.

JACKSON
v.
STOPFORD.

rates is void, the two being separable. Of course, even if the defendants were entitled to damages for breach of the covenant to indemnify them against the rates (which upon the above statement of the law in *Bradshaw* v. *M'Mullan* (1) they are not, so far as poor-rate is concerned), they would not be entitled to rely on these damages as a set-off to the plaintiff's claim in the action. These damages could only be recovered (if at all) in the counterclaim.

As to the equitable relief claimed, the defendants first rely in their defence upon a claim to have the contract between them and the plaintiff, as contained in the lease, treated on the basis of an antecedent agreement under which they were only to pay £250 a year and no more in respect of the premises, and in their counterclaim they ask to have the lease rectified by embodying this agreement in it, or, if this is not done, they ask to have the lease cancelled, and they also ask to have awarded them the amount of the rates they have paid as damages for the breach of the plaintiff's covenant to indemnify them against this rate. As to this, the first question is: was there in fact any agreement other than or different from that contained in the lease? The lease itself says that its true intent and meaning is that the lessees shall during the term hold and enjoy the premises and lands free of all rates, taxes, and assessments on payment of the reserved yearly rent of £250. Mrs. Stopford says that in August, before the lease was made, she went over the premises with Mrs. Jackson, and arranged with her the terms upon which she was to get them. She was to do some repairs. Mrs. Jackson first asked her £300 a year. She said she could not afford £300, that they were about to take Colonel Lynch's place for £250, and could not afford more. Mrs. Jackson said she would let us have the place free of any expenditure whatever save the £250 a year. We were not to pay rates or taxes; the £250 was to be all we were to pay. Mr. Cavanagh, Mr. Stopford's solicitor, says he carried out that to the best of his ability in the executed agreement; the agreement, his client informed him, had been made between the parties, and carried the same into the subsequent lease. Now, what does all this come to? Mrs. Stopford knew—in fact, all the parties, including their solicitor, knew—that there were rates and taxes, including "poor-rate," to be paid in respect of the premises, and that someone would have to pay them. Mrs. Stopford's account of the agreement is that she was not to pay them, and that the plaintiff was. That is exactly what is provided by the lease, and what Mr. Kavanagh says he carried out to the best of his ability in the executed agreement and in the lease, so that in point of fact the alleged agreement and the lease amounted to the same thing—namely, to place the burden of the rates upon the landlord and remove it from the occupier. The real difficulty and the mistake made was, not in carrying out the agreement, but that the parties did not know that the general law was different from what they and their solicitors believed it to be, and that it made void that part of the agreement which removed the burden of the poor-rate from the occupier and placed it upon the landlord; and this is the same whether one takes the alleged antecedent verbal agreement which Mrs. Stopford says was that she was not to pay more than £250 a year, the intent stated in the lease, or the clear

(1) [1920] 2 I R. 412.

provisions of the lease itself. In fact, rectification of the lease by inserting in it the exact terms of the verbal agreement deposed to by Mrs. Stopford would not in my opinion alter the legal effect of that document, so far as the rates in question are concerned. But Mr. Jellett contends that the Court can rectify or cancel a deed where its terms operate differently from what the parties intended, owing to their mistake as to the general law applicable to the transaction, and that I ought to rectify the lease by making it reserve a rent, which with the poor-rate will amount to £250. To do so would, in my opinion, be contrary to the ordinary principle ignorantia juris non excusat, and none of the cases which he has cited goes the length he has contended for—namely, that a mistake as to the general law, as distinguished from law relating to private rights, enables a party to a deed to have it rectified or cancelled. That this was a mistake of the general law applicable to all transactions of a similar kind, and not to law relating only to private right, is, I think, clear.

In *Cooper* v. *Phibbs* (1), cited by Mr. Jellett, Lord Westbury says, at p. 170:—"It is ignorantia juris non excusat; but in that maxim the word 'jus' is used in the sense of denoting general law, the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake." In *Wake* v. *Harrop* (2) the mistake was as to the meaning of the words used, and in *Hood* v. *Mackinnon* (3) the mistake was that the plaintiff had made an appointment in entire forgetfulness that she had made a previous appointment in reference to the same subject-matter. Neither of these cases in any way touches the question in the present case.

I have also been referred to three cases decided upon the effect of the provisions in the Income Tax Acts.

Blount v. *Blount* (4) was decided upon the provisions of sect. 103 of the Act of 1842, which enacts that all contracts, covenants, and agreements made for payment of interest, rent, or other annual payment in full, without allowance for deduction of income tax, shall be void. The Divorce Court had made an order or decree that the defendant should pay to the plaintiff a quarterly sum "free of income tax." The parties executed a deed reciting the order, and by this deed defendant covenanted to pay the plaintiff the quarterly sum "free of income tax." The defendant deducted the income tax, and plaintiff sued for the full amount without deduction. There was no application to reform the deed; but counsel for the plaintiff argued that the covenant in the deed might be regarded as a covenant to pay such sum as would, after the payment of income tax, produce the clear quarterly sum. Scrutton J. held that the covenant to pay the quarterly sum, "free of income tax," was void under the Act; and that defendant was entitled to deduct the income tax. He said he considered that under the deed the provisions of the Income Tax Act applied; but he thought it was

(1) L. R. 2 H. L. 149.
(2) 1 H. & G. 202.
(3) [1909] 1 Ch. 481.
(4) [1916] 1 K. B. 230.

Gordon J. 1921.

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possible that if proceedings were taken in the Divorce Court to enforce the order, the defendant might not be able to rely on the provisions of the Income Tax Act as an answer to an application for enforcement of the order. *Burroughs* v. *Abbott* (1) was decided under the Income Tax Act, 1918, which provides, by rule 23, that every agreement for payment of interest, rent, or other annual payment in full without allowing deduction of income tax shall be void. The facts of the case were in substance the same as those in *Blount* v. *Blount* (2). The wife brought an action for a declaration, &c., and in the alternative for rectification of the deed, so as to provide that the funds out of which the annuity was payable to her were held as a security to pay her the annuity, free of income tax. P. O. Lawrence J. made a decree for rectification, apparently on the ground that the order of the Divorce Court was made against the husband in invitum, and was unambiguous in its terms, and that the deed was executed by all the parties with the sole intention of complying with the order.

In *Booth* v. *Booth* (3), also decided under the Act of 1918, the husband agreed in a separation deed to pay his wife such weekly sum as would, after deduction of income tax, amount to £260 per annum. The King's Bench Division held that the covenant was not one by the husband to pay the wife £260, and also the income tax on £260, and that it did not contravene the provisions of the Income Tax Act. I have seen the order made by Lawrence J. in *Burroughs* v. *Abbott* (1), and the rectification directed by him places the payment of the annuity on the same basis as the payment under the separation deed in *Booth* v. *Booth* (3).

I have examined these cases very carefully, and, in my opinion, they do not get rid of the difficulty in the present case of rectifying or cancelling a deed on the ground of mistake of the general law. Besides, the provisions of sect. 52 of the Local Government Act, 1898, are not identical with those of the Income Tax Acts; and having regard to the interpretation placed on these provisions by the House of Lords in *Bradshaw* v. *McMullan* (4), I think a covenant like that in *Booth* v. *Booth* (3) would contravene these provisions.

Having regard to these considerations, I am of opinion that the defendants' equitable plea, and also their claim for rectification or cancellation of the lease, fail; and that the plaintiff is entitled to judgment for £250 and costs in action, and to judgment with costs on so much of the counterclaim as asks for rectification or cancellation of the lease.

Since the hearing of the action it has been agreed between the parties that of the £62 8*s*. 8*d*. paid by the defendants, £22 17*s*. 6*d*. was for rates other than "poor-rate" within the meaning of sect. 52 of the Local Government Act of 1898, and therefore the defendants are entitled to judgment with costs for this amount on the counterclaim for damages for plaintiff's breach of her covenant to indemnify them against these rates.

(1) W. N. (1921) 336.
(2) [1916] 1 K. B. 230.
(3) W. N. (5th Nov., 1921).
(4) [1920] 2 I. R. 412.

The defendants appealed to the Court of Appeal in Southern Ireland (1).

Appeal. 1922.

JACKSON *v.* STOPFORD.

Feb. 6, 7. July 17.

Jellett K.C., *Conner K.C.* (with them *O'Donoghue*), for appellants.

Gibson K.C. and *Rearden*, for the respondent.

Cur. adv. vult.

RONAN L.J. :—Mr. Justice Dodd will deliver the unanimous judgment of the Court.

DODD J. :—

We are all of opinion that the judgment of Mr. Justice Gordon is correct.

The decision of the House of Lords in *Bradshaw* v. *M'Mullan* (2) presses hard upon ladies in the position of the defendant. The lease was in a form in common use for those who desired to have a clear net income from the land, over and above all taxes and rates ; but contracting parties are assumed to know the law, and it is quite clear that under such a contract of tenancy the tenant is entitled to deduct the poor-rate. The "agreement" not to deduct it is null and void. But the present application is founded on a supposed equity to alter "the agreement" so as to evade the decision in *Bradshaw* v. *M'Mullan* (2). I content myself by saying that such a ground of equity is unknown to our law.

The defendants appealed to the High Court of Appeal for Ireland (3).

1922.

Nov. 27, 28. Dec. 5.

Jellett K.C. and *Conner K.C.* (with them *Kavanagh*), for the appellants :—

The intention of the parties is clear. It is admitted that the tenant was to pay £250 per annum, and no more. Since the decision in *Bradshaw* v. *M'Mullan* (2) it is clear that a covenant by the lessor to pay the poor-rate is void. We ask the Court to rectify the document, so as to carry out the lawful intention of the parties or to cancel it. From the year 1913 to the date of the decision in *Bradshaw* v. *M'Mullan* (2) that intention was carried out by the parties ; but since that decision the lessor insists that the tenant pay the poor-rate. The result is that my clients now become liable for £81 per annum more than heretofore. A Court of equity should not permit such a hardship. In reducing the oral agreement to writing, its effect was not correctly stated. The intention is admitted to be that my client was to pay £250 per annum only. It is one thing to say that a landlord is to pay the poor-rate ; it is a totally different thing to say that in

(1) Before RONAN and O'CONNOR L.JJ., and DODD J. (2) [1920] 2 I. R. 412.

(3) In the High Court of Appeal for Ireland, before SIR JOHN ROSS, Bart., C., O'CONNOR M.R., and SIR DENIS HENRY, Bart., C.J. (N. I.).

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arriving at the rent to be paid by the tenant, the fact that the poor-rate is paid by the tenant is to be taken into account. When the Courts have been confronted with an illegality in a case like this, they have always moulded the contract so as to avoid the illegality. The bargain in this case can be carried out in a legal way. This is not a case of one party to the bargain having made a mistake. It is a mutual mistake as to the general law. We do not ask the Court to make the landlord pay the poor-rate; all we ask is that the contract between the parties be moulded, having regard to the incidence of taxation. If the Court cannot rectify, then we ask for cancellation—cancellation on the ground of mistake. The tenant was to pay a fixed, definite sum for what the landlord had to give. Owing to a mistake as to the general law the bargain cannot be carried out. The mistake is not a mistake in a minor point, but in the substance of the transaction.

[O'CONNOR M.R.—Do you ask for cancellation from the date of the agreement?]

Jellett K.C.—No. From the date of the order.

FitzGibbon K.C. and *Rearden*, for the respondent:—

The Court of Appeal in Southern Ireland entirely approved of the judgment of Mr. Justice Gordon, who went fully into the authorities. Rescission of a contract cannot be had unless there be fraud. There must be fraud proved before the Court will set aside an executory contract on the ground of mistake. For half the entire period of the lease the defendants have been in occupation of the premises without complaint. That in itself is a bar to a claim for rescission. You cannot restore the parties in integrum. Rescission must date back to the date of the contract, and must be rescission in toto. The Court cannot rescind as of to-day.

Bradshaw v. *M'Mullan* (1) decides that all attempts to throw the burden of the poor-rate on the lessor are void. The Court should refuse the relief asked for, because it would be against the policy of the statute to grant it.

The Court cannot rectify. Where there is a written agreement, and a lease executed in pursuance of that agreement, you cannot rectify the latter document, except so as to make it conform to the previous agreement; and you cannot vary the previous written agreement by parol first, in order to found a case for the rectification of the latter document. We do not admit mutual mistake.

[Authorities cited and discussed:—*Bradshaw* v. *M'Mullan* (1); *Wycherly* v. *Flynn* (2); *Wake* v. *Harrop* (3); *Carolan* v. *Brabazon* (4); *Daly* v. *Deegan* (5); *Davies* v. *Fitton* (6); *Alcard* v. *Walker* (7); *Stone* v. *Godfrey* (8); *Burroughs* v. *Abbott* (9); *Brook* v. *Price* (10); *Booth* v. *Booth* (11); *In re Saillard* (12); *Re Peck's*

(1) [1920] 2 I. R. 412.
(2) [1922] 2 I. R. 169.
(3) 1 H. & C. 202.
(4) 3 Jones & La Touche, 200.
(5) 1 Ir. Eq. R. 311.
(6) 2 Dr. & W. 235.
(7) [1896] 2 Ch. 369.
(8) 5 De G. M. & S. 90.
(9) [1922] 1 Ch. 86.
(10) [1917] A. C. 125.
(11) [1922] 1 K. B. 66.
(12) [1917] 2 Ch. 401.

Settlement (1); Halsbury's Laws of England, vol. xxi, pp. 4 and 12; Fry on Specific Performance, pp. 375 and 469; *Hood* v. *MacKinnon* (2); Kerr on Fraud (ed. 1920), pp. 93 and 494; *In re Walton's Settlement* (3); *Daniel* v. *Arkwright* (4); *Gaskell* v. *King* (5); *Beadel* v. *Pitt* (6); *May* v. *Platt* (7); *Smith* v. *Shaw* (8); *Midland Great Western Railway* v. *Johnson* (9); *Seddon* v. *N.-E. Salt Co.* (10); *Angel* v. *Jay* (11); *Tuff* v. *Guild of Drapers of the City of London* (12).]

O'CONNOR M.R.:—

The Lord Chancellor and the Lord Chief Justice of Northern Ireland have asked me to deliver the judgment of the Court in this case.

The action which is the subject of this appeal was brought for the recovery of £250, one year's rent of lands situate in Co. Cork, which became due by the defendants to the plaintiff on the 1st September, 1921. There was no dispute as to the liability for rent or the amount thereof, but the defendants claimed that they were entitled to credit against it for poor-rate paid by them. This was the only question involved, and its determination depends upon a covenant in the lease under which the defendants hold the lands from the plaintiff.

The lease is dated the 29th December, 1913. It demises the lands to the defendants and reserves the annual rent of £250 "free of rates, taxes, and assessments, which are to be paid by the lessor as hereinafter mentioned." In addition to the usual covenants, there is contained in the lease the following:—"And the lessor doth hereby covenant with the lessees that she the lessor shall during the said term pay and discharge all rates, taxes, assessments, and outgoings of every nature and kind payable out of or in respect of said premises and lands, it being the true intent and meaning hereof that the lessees shall during the said term hold and enjoy the said premises and lands free of all rates, taxes, and assessments as aforesaid on payment of said reserved yearly rent of £250."

Since the execution of the lease and down to the 1st September, 1920, the plaintiff and defendants dealt with each other on the assumption that the plaintiff was bound by the covenant, that is, if the defendants paid the full sum of £250 in any one year, the plaintiff paid the poor-rate for that year; or if the defendants paid the poor-rate they were allowed to take credit for the amount so paid as against the rent due. It is unnecessary to determine which course was adopted.

This mode of dealing was subsequently repudiated by the plaintiff owing to the decision of the House of Lords in *Bradshaw* v. *M'Mullan* (13). It was held in that case that a contract such as that which is contained in the covenant I have mentioned is void as being contrary to sect. 52, sub-s. 2, of the Local Government Act, 1898, by

(1) [1921] 2 Ch. 237.
(2) [1909] 1 Ch. 476.
(3) [1922] 2 Ch. 509.
(4) 2 H. & Millar, 95.
(5) 11 East, 165.
(6) 11 L. T. 592.
(7) [1900] 1 Ch. 616.
(8) [1918] Prob. 47.
(9) 6 H. L. Cases, 798.
(10) [1905] 1 Ch. 326.
(11) [1911] 1 K. B. 666.
(12) [1913] 1 K. B. 40.
(13) [1920] 2 I. R. 412.

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which it is enacted that: "The occupier of a hereditament shall not be entitled to deduct from his rent any part of the poor-rate, and any contract to the contrary respecting such deduction shall be void." Relying on this section, the plaintiff refused to pay the poor-rate, or if the defendants paid it, to allow any credit for it.

Having regard to the decision in *Bradshaw* v. *M'Mullan* (1), it was not open to the defendants to contend that the covenant in the lease is valid; but an equitable defence has been set up, and the alleged equity is made the subject of a counterclaim. This equity, as put forward, is one to have the lease reformed or at least to have it cancelled. It is alleged that the lease was executed in pursuance of an agreement dated 30th September, 1913, by which it was agreed that the lease should contain such terms, provisions, and covenants as would ensure that the annual sums payable by defendants should not, after taking into consideration all rates and taxes payable by the defendants, exceed the sum of £250 per annum, and that the lease should be prepared so that in no circumstances should the defendants be liable to pay any greater sum annually by way of rents, rates, taxes, and other assessments than £250. It is further alleged that the lease was prepared and approved by the solicitors for the plaintiff and defendants under the belief that it embodied the alleged agreement, and was executed under that belief, and that if and so far as the terms of the lease do not carry out the agreement the same was executed under an entire mistake on the part of both the plaintiff and the defendants.

If the agreement was exactly as alleged, it would not, I think, affect the decision I have arrived at, but the agreement was not, in fact, in the terms as stated. The material parts of the written agreement as proved are as follows:—It provided that the rent should be £250, free of rates, taxes, and assessments of every nature and kind, which were all to be paid by the lessor. It also provided that the lease should contain covenants by the lessor to pay all rates, taxes, assessments, and outgoings of every nature and kind payable out of or in respect of the lands and premises, it being the intention that the lessees shall during the term hold the lands free of all rates and taxes as aforesaid on payment of the rent of £250. This was in fact the agreement, and I fail to see any variance between it and the lease executed in pursuance of it.

The appellants'—that is, the defendants'—counsel feeling this difficulty, sought to take up another position behind a verbal agreement which preceded the written agreement. Just as it was alleged that the lease was at variance with the written agreement, so it was alleged that the written agreement was at variance with the verbal agreement, which the writing was intended to express. I doubt very much if such a case was open, but it is unnecessary to discuss that, because when I come to the evidence of the verbal agreement, assuming it to be admissible (2), which I think it is not, it appears to be nothing more than a short expression of what it contained in expanded form in the written agreement. The defendant, Mrs. Stopford, in her

(1) [1920] 2 I. R. 412.

(2) See on this point *Craddock Brothers, Ltd.*, v. *Hunt*, [1922] 2 Ch. 809.—ED.

evidence says that the agreement was that they, viz., the defendants, were not to pay rates or taxes; the £250 was all they were to pay.

It comes then to this, that the same invalidity which affects the covenant in the lease affects the written agreement, and also the initial verbal agreement, so that the position of the defendants is just as untenable behind the agreements as behind the lease.

The real case of the defendants is that they entered into a contract with the plaintiff, the terms of which they thoroughly understood, but the legal effect of which was not known to either party. Does this afford any defence or give the right to any equitable relief? The defendants claim rectification, but rectification is only applicable to a case in which there was an agreement, and a subsequent failure to express it as made. That is not this case. But the defendants also claim cancellation. This raises the question: can a party get relief from an instrument simply because he does not know the legal consequence? Or, putting the question in a way which more nearly fits the present case: can a party get relief from an instrument which contains a clause in violation of the law on the ground that he did not know that he was violating it? We were not referred to any authority in support of such a proposition, which is opposed to the well-established principle ignorantia juris non excusat. The ignorance in the present case was not the ignorance of a mere private right. It was ignorance of the statute law governing every member of the community, regulating the local government of the country, and the relations of landlord and tenant. To countenance the proposition that instruments inter partes should be cancelled because they did not know the general law of the land would lead to insecurity in the ordinary transactions of every-day life.

It was suggested by reason of the invalidity of the provisions in the lease that the lessor should pay the poor-rate, that the whole lease was void, and that no action could be brought upon it. The very same point, if a good one, was open in *Bradshaw* v. *M'Mullan* (1); and it is significant that it was not relied on either in the King's Bench, in the Court of Appeal, or in the House of Lords. It was referred to in the judgment of Gibson J. in the King's Bench Division. He says, at page 492: "As the point, though the Court called attention to it, was not dealt with in argument, and my opinion on the rest of the case makes a decision on it unnecessary, I only notice it lest it should be supposed to have been tacitly determined in the plaintiff's favour." The point then must not have been overlooked by counsel or the Court of Appeal or by the House of Lords. It must have remained unmentioned as untenable and not arguable. I can quite understand this, because the plain meaning of sect. 52, sub-s. 2, of the Local Government Act, 1898, is that the full rent shall be paid notwithstanding any provision that the poor-rate shall be deducted.

Having regard to the judgment of Gordon J., who tried the action, and his careful review of the authorities, I do not think it necessary to deal with them again; but there is one authority which was not dealt with by him, and about which I would like to say something, as it was strongly relied on by defendants' counsel. This is *Davies* v. *Fitton* (2), a case decided by Lord St. Leonards. His judgment was relied upon

(1) [1920] 2 I. R. 412.

(2) 2 Dr. & W. 225.

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in the argument of counsel for the defendant in *Bradshaw* v. *M'Mullan* (1) during the hearing in the King's Bench Division, and it was dealt with by Madden J., the dissenting Judge, whose judgment was upheld in the House of Lords. This is what he said about it:— "The question of the legality of an agreement made after the passing of this Act (the Tithe Composition Act), by which a tenant offered to pay £100 rent and an additional sum of £5 yearly in consideration of the tithes (which had then been converted into tithe rentcharge) being cast upon him, came before Lord St. Leonards when Sir E. Sugden C. The contract was in fieri, and it was argued that to grant specific performance of such a contract would enable the parties to evade the provisions of an Act of Parliament; and it is evident that Sir Edward Sugden felt some difficulty in the matter, for in a subsequent case— *Carolan* v. *Brabazon* (2)—in which it became necessary to decide the point, having referred to certain decisions and the intimation of his own opinion, which will be found in *Davies* v. *Fitton* (3), he said:— 'Where there is an agreement to make the tithe rentcharge payable by the tenant, and the agreement rests in fieri, the Court may, in favour of the intention, and without being liable to the imputation that it is permitting an evasion of the Act, add the amount of the rentcharge to the rent as the landlord himself might have done, and so give to each party what he contracts for. I shall follow these authorities, which I am not prepared to overrule; but though I have expressed an opinion the same way, I am not inclined to carry the doctrine further.'" Madden J. then goes on to say: "We are asked in the present case to carry the principle of this case further, and to apply it to a state of facts which is essentially different. In the first place, the agreement between the parties in this case does not rest in fieri. It is factum. This is the effect of the 4th section of the Landlord and Tenant Act of 1860, by which a note in writing signed by the landlord is as effective in creating a tenancy as a deed under seal. I doubt that a Court of equity would entertain a suit for specific performance for the purpose of substituting one form of contract for another which the Legislature has declared to be equally effective; but if it were to do so, I am of opinion that it would embody in the deed the agreement on which the action was founded, and not another and a different one." All this applies with force to the present case. The defendants could only escape from the existing lease by substituting for it another which would be at variance with the agreement entered into.

For these reasons we are of opinion that the appeal should be dismissed, and the judgment of the Court below affirmed, with costs.

Solicitor for the plaintiff: *Arthur Julian.*
Solicitors for the defendants: *Philip W. Bass & Co.*

H. J. M'C.

(1) [1920] 2 I. R. 412. (2) Jones & La Touche, 200. (3) 2 Dr. & W. 225.

THE KING (JOHNSTONE) *v.* THE OFFICER COMMANDING ARDARAVAN HOUSE BARRACKS. JOHNSTONE *v.* O'SULLIVAN AND OTHERS (1).

K. B. Div. (*S. I.*) 1922.

Nov. 22, 23.

Appeal. (*S. I.*) 1922.

Nov. 27, 29, 30. Dec. 2, 4.

(1922. No. 5626.)

Habeas corpus — Anglo-Irish Treaty, Article 17 — *Irish Free State (Agreement) Act*, 1922 (12 *Geo.* 5, *c.* 4), *sect.* 1, *sub-s.* 2 — *Provisional Government — Rebellion — Establishment of army — Creation of military Courts — Validity — Order refusing habeas corpus — Right of appeal — Judicature (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 57), *sect.* 24, *sect.* 50.

Under Articles of Agreement for a Treaty between Great Britain and Ireland, dated December 6th, 1921, and ratified and declared to have the force of law by the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), the Irish Free State was declared to have the same constitutional status in the community of nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace, order, and good government of Ireland, and an executive responsible to that Parliament. Pending the constitution of a Parliament and Government of the Irish Free State, Article 17 of the Treaty provided "by way of provisional arrangement for the administration of Southern Ireland" for the constitution of a Provisional Government, and the transfer to it of the powers and machinery requisite for the discharge of its duties. The Provisional Government was constituted on January 16th, 1922, and on April 1st an Order in Council was made transferring to it certain services theretofore controlled by the British Government, but specifically excluding control or administration of any of the existing naval, military, or air forces of the Crown. In accordance with sect. 1, sub-s. 2, of the Irish Free State (Agreement) Act, 1922, an election was held of members to constitute the House of Parliament to which the Provisional Government should be responsible. The House of Parliament, known as Dáil Eireann, so elected met for the first time on September 9th, 1922. In the meantime an armed rebellion against the authority of the Provisional Government had broken out. In order to suppress that rebellion a National army was raised by the Provisional Government. That army, acting under a resolution passed by Dáil Eireann, established military Courts for the trial of civilians charged with the commission after October 15th, 1922, of certain offences, including attacks upon the National army, looting, arson, or having possession without proper authority of arms, ammunition, or explosives. On October 21st, two ladies, Mrs. and Miss J., were arrested by members of the National army. Subsequently charges under the military regulations were formulated against them, and they were informed that it was intended to try them before a military Court. They applied for a writ of habeas corpus; also, by way of civil action, for an injunction to prevent the military authorities from proceeding with the trial before a military Court on the ground that the Provisional Government had no power to create an army; that the said military Courts were wholly illegal, and contrary to the laws and statutes of the realm; and that the resolution passed by Dáil Eireann, and the orders and proclamations issued by the Army Council pursuant thereto were illegal and ultra vires.

Held, that an appeal lay to the Court of Appeal from the order of the King's Bench Division refusing the writ of habeas corpus.

Held (affirming the King's Bench Division), that a state of war existed at the date of the arrests, and still exists in Southern Ireland.

Per O'Connor L.J.: A military Court is not a Court in any legal sense; and there being, therefore, no "criminal cause or matter" involved, an appeal lay.

(1) In the King's Bench Division, before MOLONY C.J. and DODD and SAMUELS JJ.

K. B. Div. (*S. I.*) 1922.

JOHNSTONE *v.* O'SULLIVAN.

Held (affirming the King's Bench Division, Ronan L.J. dissenting), that the troops organized by the Provisional Government, having been engaged to the knowledge of the Lord Lieutenant, the King's representative in Ireland, in putting down rebellion, the fair and obvious inference was that to the army of the Provisional Government was entrusted the work of quelling it.

To come within the principle of *Ex parte Marais* ([1902] A. C. 109), all that is necessary is that an army should be properly authorized to undertake the task of suppressing rebellion by those properly qualified to give such authority; and as long as rebellion is raging the Courts have no power to interfere with the action of the military in restoring order.

Per Pim J.: There is an inherent right at common law in every government that may be attacked to defend itself, and to form an army for the protection of itself and the people committed to its charge.

MOTION ON NOTICE for a writ of habeas corpus on behalf of Mrs. Catherine Johnstone and her daughter, Miss Georgie Johnstone, of Lough Neagh, Church Hill, Letterkenny, County Donegal, who were detained in military custody at Ardaravan House, Buncrana, by the defendant, an officer in the National army. The ladies also applied for an injunction to restrain the military authorities from proceeding with the trial before a military Court on the ground that the said military Courts were wholly illegal, and contrary to the laws and statutes of the Realm; and that the resolution passed by Dáil Éireann, and the orders and proclamations issued by the Army Council pursuant thereto, were illegal and ultra vires.

The facts are stated in the judgment of the Court.

Serjeant Hanna K.C., *Lynch K.C.* (with them *Smith*), for the applicants.

Kennedy K.C. and *O'Byrne*, for the defendants.

Nov. 23.

MOLONY C.J.:—

On the 21st October, 1922, Catherine Johnstone and Georgie Johnstone, her daughter, were arrested by an officer of the Free State army and conveyed to Buncrana, where they have since been detained in military custody. They now apply to this Court for a writ of habeas corpus, and Mr. Serjeant Hanna has strenuously argued on their behalf that their detention is illegal, and that it is our manifest duty to order their release.

The arguments for the two ladies have covered a wide ground, but, for the most part, they seem to me to have been founded on a misapprehension of the constitutional position of the Irish Free State and the powers and duties of the Provisional Government in relation to it.

Under the Articles of Agreement for a Treaty between Great Britain and Ireland, dated 6th December, 1921, and ratified and declared to have the force of law by the Irish Free State (Agreement) Act, 1922, the Irish Free State was declared to have the same constitutional status in the community of nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace, order, and good government of Ireland, and an executive responsible to that Parliament.

It was, of course, manifest that an interval must elapse before the Constitution could be settled and a Government established in accordance with it; and the provision was made by Article 17 for constituting a Provisional Government, and transferring to it the powers and machinery requisite for the discharge of its duties.

The Provisional Government was duly constituted on the 16th January, 1922, and on the 1st April, 1922, an Order in Council was made transferring to it the administration of certain services theretofore controlled by the British Government. The services so transferred had reference to Finance, Home Affairs, Economic Affairs, Labour, Agriculture, Education, Local Government, and the Post Office. It was not necessary in this order to deal with the question of defence, because until an agreement was made between the British and Irish Governments whereby the Irish Free State undertook her own coastal defence, the defence by sea of Great Britain and Ireland was to be undertaken by His Majesty's Imperial forces (Clause 6), and the Government of the Irish Free State was fully empowered to establish and maintain a military defence force within the limits prescribed by Clause 8.

The Provisional Government being thus constituted, on the 27th May, 1922, published a proclamation declaring the calling of a Parliament of Ireland in accordance with the provisions of the Irish Free State (Agreement) Act, 1922, and the Parliament duly met for the first time on the 9th September, 1922.

In the meantime a state of war or rebellion had arisen in Ireland, and it became the duty of the Government to take all necessary steps to suppress it. The British forces had left, or were in the act of leaving, the country; and, as stated by General O'Sullivan in his affidavit, the ordinary police forces were not able to deal with the disorders, and outside the City of Dublin the ordinary police force was only in process of formation, and had not yet been fully organized. In the circumstances, General O'Sullivan states that the Government has charged the National army raised under its authority with the task of suppressing disturbances, protecting the lives and property of the people, and generally restoring peace and order and normal conditions, and establishing the authority of the lawfully constituted Parliament and Government of the people.

It is quite true that the army so referred to is not an army formed in accordance with Clause 8 of the Treaty, or in pursuance of an Act of the Parliament of Ireland similar to the Army Act; but when the Government of a country is attacked it has, apart from any statutory or other provisions, an inherent right to organize a force and to take such other steps as it may deem necessary to quell the insurrection.

In the present case the Government were especially careful to inform Parliament during its sittings, and to obtain the approval of Parliament to the steps which it considered necessary. The Government having sanctioned the setting up by the army authorities of military Courts or committees for the inquiring into charges against persons in respect of certain offences—including attacks upon the National forces, looting, arson, or having possession, without proper authority, of arms, ammunition, or explosives—and the infliction by such military Courts or committees of the punishment of death, penal

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servitude, fine, or imprisonment on any person found guilty by such Court or committee, Parliament, on the 27th September, 1922, on the motion of the Minister of Defence, passed a resolution ratifying and approving of the sanction given by the Government, and the doing by the army authorities of all or any of the acts and matters referred to.

On the 2nd October, 1922, the Army Council issued regulations providing for the trial by military Courts of civilians charged with the offences referred to in the resolution of the Dáil of the 27th September, and on the following day the Government issued a proclamation declaring an amnesty for all persons engaged in the rebellion who should deliver up possession of their arms before the 15th October, 1922, and should on or before that date voluntarily cease to take any part in or aid or abet the insurrection.

By a proclamation, signed on behalf of the Army Council by General Mulcahy, and dated the 10th October, 1922, it was announced that after the 15th October, 1922, the Army Council would exercise the powers which had been given to them by the Government and sanctioned by the Dáil, and that the regulations as to the trial of civilians by military Courts would come into force on the same date.

This was the position of affairs on the 21st October when Mrs. and Miss Johnstone were arrested. There was some delay in formulating the charges, but formal charges have now been preferred in accordance with the regulations against Mrs. Johnstone of:—

1. Being on the 17th day of October, 1922, in unlawful possession of public property, in that she had in her possession at Loughveagh House, Gartan, Co. Tirconaill, part of a wireless set, which are believed to have been taken from Bunbeg Wireless Station, Co. Tirconaill.

2. Having on the 19th day of October, 1922, possession, without proper authority, of a quantity of bombs, in that she had in her possession at her premises at St. Columb's Hotel nine large bombs, commonly called Republican bombs, and one Mill's bomb, No. 9; also a coil of wire such as is used for exploding road mines.

3. Having on the 22nd October, 1922, possession, without proper authority, of a further quantity of bombs, in that she had in her possession at her premises at St. Columb's Hotel 4 Mill's bombs, 20 detonators, and 3 rounds of ·303 ammunition.

4. Being on the 23rd October, 1922, in unlawful possession of property not her own, in that she had in her possession on her premises at Loughveagh House aforesaid one Overland motor-car, which was not her property.

Miss Johnstone is charged with the single offence of having on the 21st day of October, 1922, possession, without proper authority, of an automatic pistol.

It is contended by Serjeant Hanna that there is no power to try these ladies by a military Court. It must, however, be remembered that these military Courts are established, as is stated in the proclamation of the 10th October, 1922, with a view "to the speedy termination of the present state of armed rebellion and insurrection, and the restoration of peace, order, and security," and it is not contended that they have any authority or justification under the ordinary law.

The first question, therefore, to be determined is whether a state

of armed insurrection or rebellion at present prevails in the County Donegal. General O'Sullivan has given numerous instances of the disorder existing in that county, and states that such disturbances and disorders have continued to exist, and do exist at the present time, and that there are in that county at the present time various marauding bands of irregular forces, most of whom do not belong to that county, but they operate there with a certain amount of local support.

The statements in General O'Sullivan's affidavit are not seriously contested, although it is stated by Mrs. Johnstone in her affidavit that the County Courts of the county have been and are carrying out their functions, and that a Court of the district magistrates has been held quite recently. It is, however, a remarkable fact that it has been found impossible to hold County Courts at Letterkenny or Buncrana, and that the business formerly done in these towns was transferred to Lifford by decree of the Provisional Government dated 21st September, 1922.

I have no doubt that we must hold that a state of war does exist in County Donegal which justifies the application of martial law. It follows, therefore, on the authority of *R.* v. *Allen* (1), *R.* (*Garde and Others*) v. *Strickland* (2), and *R.* (*Ronayne and Others*) v. *Strickland* (3), that once a state of war is established we have no jurisdiction durante bello to inquire into or pass judgment upon the conduct of the military authorities in repressing the rebellion. In the present case, however, we may be permitted to say that in all the steps which have been taken by the military authorities they seem to have acted in strict accordance with the powers which have been given to them by the Provisional Government and sanctioned by Parliament.

DODD J. and SAMUELS J. concurred.

A motion by the prosecutors as plaintiffs in the suit of *Johnstone* v. *Major-General Gearoid O'Sullivan and Others* for an interlocutory injunction pending the hearing of the plaintiffs' claim was also refused.

H. H.

The prosecutors and plaintiffs appealed to the Court of Appeal in Southern Ireland (4).

H. Kennedy K.C., Law Officer of the Provisional Government (with him *T. Sullivan K.C.* and *J. O'Byrne*), for the respondents:—

We submit that an appeal does not lie from an order refusing a writ of habeas corpus. Where a person has been discharged from custody by an order of the High Court under a habeas corpus, the Court of Appeal has no jurisdiction to entertain an appeal: *Cox* v. *Hakes* (5). The principle of that case applies also to an order refusing habeas corpus. Sect. 50 of the Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), prohibits an appeal from any judgment of the High Court "in any criminal cause or matter." In this case four charge-

(1) [1921] 2 I. R. 241.
(2) [1921] 2 I. R. 317.
(3) [1921] 2 I. R. 333.
(4) In the Court of Appeal in Southern Ireland, before RONAN and O'CONNOR L.JJ., and PIM J.
(5) 15 A. C. 506.

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sheets had been delivered to those ladies charging them with crimes. Military Courts or committees had been established under a resolution passed by the Provisional Parliament. The jurisdiction and powers of these Courts were contained in a notification published in "Iris Oifigiuil" (the "Dublin Gazette") of October 3rd, 1922. The intention is to charge these two ladies before a military Court; and as they are to be charged with crimes, this is a criminal cause or matter within the meaning of the Judicature Act. What is a criminal cause or matter? In order that a matter may be a criminal cause or matter it must fulfil two conditions laid down by Lord Cave in *Clifford* v. *O'Sullivan* (1), as follows:—"It must involve the consideration of some charge of crime, that is to say, of an offence against the public law ('Imperial Dictionary,' tit. 'Crime' and 'Criminal'); and that charge must have been preferred or be about to be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence." These two conditions have been fulfilled in this case.

Serjeant Hanna (with him *P. Lynch K.C.* and *P. Smith*), for the appellants:—

What *Clifford* v. *O'Sullivan* (1) decided was that military Courts were not Courts exercising judicial functions, and that the offences for which persons were charged before them being breaches of military ordinances were not crimes, and did not constitute criminal matters within the meaning of sect. 50 of the Judicature Act.

RONAN L.J. refers to *In re Keller* (2).

We submit on the authority of *Barnardo* v. *Ford* (3) and *In re O'Hara* (4) that an appeal lies.

The Court announced that no decision would be given on the preliminary objection until the whole case had been heard.

Serjeant Hanna and *P. Lynch* (with them *P. Smith*), for the appellants:—

The real question in this case is: What is the position in law of the force called "the National Army"? When the Treaty between Great Britain and Ireland was signed and the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), was passed, the Army and Air Force (Annual) Act, 1921 (11 Geo. 5, c. 9), and the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), were in operation. The Army Act recites: "Whereas the raising or keeping of a standing army within the United Kingdom of Great Britain and Ireland in time of peace, unless it be with the consent of Parliament, is against law." Under the Government of Ireland Act, 1920, the Parliament of Southern Ireland "shall not have power to make laws in respect of . . . the navy, the army, the air force, the territorial force, or any other naval, military, or air force, or the defence of the realm." Up to the passing of the Irish Free State (Agreement) Act, March 31st, 1922, there was no power in anyone except the Parliament of the United Kingdom to

(1) [1921] 2 A.C. 570, at p. 580.
(2) 22 L. R. Ir. 158.
(3) [1892] A.C. 326.
(4) [1900] 2 I. R. 232.

create an armed force in Ireland, and that Parliament had power to raise an army only for a year.

Article 17 of the Treaty and the Irish Free State (Agreement) Act, 1922, provided for the establishment of a Provisional Government for the administration of Southern Ireland during the interval between December 6th, 1921, and the constitution of a Parliament and Government of the Irish Free State; a Provisional Government was constituted on January 16th, 1922. Article 8 of the Treaty empowers the Government of the Irish Free State to establish and maintain, subject to certain limitations, a military defence force; but that power is not given to the Provisional Government. Article 9 of the Provisional Government (Transfer of Functions) Order, dated April 1st, 1922, provides that "nothing in this order shall affect the control or administration of any of the existing naval, military, or air forces of the Crown, or transfer to any department of the Provisional Government any of the powers of any existing department in relation to any of those forces." Any powers the Provisional Government possessed were derived by transfer from the British Government. Eight ministries were enumerated in the Transfer of Functions Order; and the heads of these ministries were to exercise "the functions in connexion with the administration of public services in Southern Ireland heretofore performed by existing Government departments and offices." In "Iris Oifigiuil" (the "Dublin Gazette") of April 14th, 1922, the names of the ministers appointed to each of the ministries transferred were announced.

In pursuance of sect. 1, sub-s. 2, of the Irish Free State Agreement Act, an election was held in June of members of "the House of Parliament to which the Provisional Government shall be responsible"; and on June 27th a proclamation appeared summoning a meeting of "the House of the Parliament" on July 1st. Eventually the Provisional Parliament met on September 9th, 1922. On that day two new ministries were created—Ministry of Defence and Ministry of External Affairs. The Provisional Government or Parliament had no power to create these ministries. On September 29th a decree authorizing the issue of commissions in the army of the Free State was published. This is the first official document dealing with the army that we have been able to find. It was issued by the Chairman of the Provisional Government and the Acting Secretary to that Government under seal. We submit that under the Treaty and the Irish Free State (Agreement) Act the Provisional Government has no power to create an army, and that the only lawfully constituted army in Ireland is the British army, which could have been used in quelling the rebellion.

On November 17th a notice, dated September 28th, was published announcing that an Army Council had been constituted. Proclamations, published on October 3rd and October 31st, dealt with the establishment of military Courts in pursuance of a resolution passed by Dáil Éireann on September 28th, and stated that any civilians found guilty by these Courts of any of the offences specified in the resolution were liable to any of the punishments following, according to the nature and gravity of the offence:—death, penal servitude, imprisonment, deportation, internment, fine. The army in question

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here is not a legally constituted army. It is merely a body of armed civilians; but the power even of a regularly constituted army to create offences and establish Courts may be disputed. New Courts and new offences can only be created by Parliament. An Act could not have been passed by the Provisional Parliament without the assent of the King. When war is on, the King is presumed to be at the head of his army; when the Courts are sitting, the King is presumed to be at the head of the Courts, and if the King's Courts are available the trend of authority is that military Courts will not be upheld.

This case is not governed by the doctrine laid down in *Ex parte D. F. Marais* (1), namely, that where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals. The military authorities involved in that case were the King's army. That and all the other reported cases on the subject deal with regularly constituted and authorized forces: see *Phillips* v. *Eyre* (2); *The Queen* v. *Nelson and Brand* (3).

Under the delegated powers given to it the Provisional Government had no express power to create an army. The Courts do not extend the scope of delegated authority: see *Sprig* v. *Sigeau* (4); *Rice* v. *The Queen* (5); *Rex* v. *The Earl of Crewe* (6).

An important element to be considered in this case is that when these ladies were arrested and informed that they were to be tried by a military Court the County Court and District Courts were functioning in County Donegal.

T. Sullivan K.C. and *Hugh Kennedy K.C.*, Law Officer to the Provisional Government (with them *J. O'Byrne*) for the respondents:—

Our case is that a state of war exists; that during the continuance of the war civil Courts cannot interfere with the military Courts; and that the respondents represent the military authorities.

[RONAN L.J.: We all agree with the Court below as to the existence of a state of war.]

The forces whose operations are not to be interfered with during a state of war are military forces; and the justification for the acts of military forces in such circumstances is necessity—the necessity of repelling force by force: *Marais' Case* (1); *Tilonko* v. *Attorney-General of Natal* (7). It is not necessary to show that there is a regularly constituted statutory army. What has to be established is that war is raging and that force is necessary to maintain the Government of the country. If the Government is attacked by force, it is justified in using force to repel that attack. The mere fact of its formation gave the Provisional Government power to defend its own existence.

The Provisional Government is a Government recognized by the Parliament of the United Kingdom. An attempt being made to make war or rebel against that Government, there was an inherent right in it to protect itself. The rebels tried to overturn the Government of the country.

(1) [1902] A. C. 109.
(2) L. R. 4 Q. B. 225; L. R. 6 Q. B. 1.
(3) Cockburn's Report.
(4) [1897] A. C. 247.
(5) 10 A. C. 675.
(6) [1910] 2 K. B. 675.
(7) [1907] A. C. 93.

[RONAN L.J.: The object was to establish a republic in Ireland?]

And incidentally to make the carrying on of the Provisional Government impossible. It has been pressed on the Court that because there were armed forces of the British Government in this country that limited, in some way, what the Provisional Government could do. The Provisional Government had no power over these forces. Once the Provisional Government recognized and adopted a body of armed men as their forces, the principle of *Marais' Case* (1) applies. They need not be long-established military forces. The principle applies to any forces recognized by the legal Government. Shortly, our proposition is this: that there must of necessity be implied power in any recognized Government to maintain its own existence: Halsbury's Laws of England, vol. vi, pp. 402–3; Forsyth's Opinions, pp. 551 and 559 (Sir Edward James and James FitzJames Stephens).

We dispute the proposition that the powers of the Provisional Government are limited to administration. Under the Transfer of Functions Order a Ministry of Home Affairs was established, and subsequently the Ministry of Defence took over the functions of the Home Office so far as they related to the maintenance of order and the protection of society. The British army is not set up under the Army Act or the Army Annual Act. It is set up under a vote of supply; and the object of the Army Act is to regulate the discipline of the army, if one is established and supplies voted for it. In any event, these Acts relate to an army in time of peace. Here we are dealing with an armed rebellion against lawfully constituted government. The army here is in all senses a regular army, owing its existence to a vote of money by the Provisional Parliament. The civil Courts cannot inquire into the acts or conduct of an army engaged in suppressing rebellion.

Hanna, in reply:—

If the other side is right, anybody could raise an army. An extension of the principle of *Marais' Case* (1) to armed citizens would tend to create an ascendancy of military power in the State.

He referred to *Egan* v. *Macready* (2); *In re De Keysers Royal Hotel, Ltd.* (3).

Dec. 4.

O'CONNOR L.J.:—

I am sorry that my colleague, Lord Justice Ronan, is prevented by indisposition from attending to deliver his own judgment. He desires me, however, to say that his opinion on the case is as follows:—"1, That the appeal lies; 2, that the appeal should be allowed, so far as the habeas corpus application is concerned, and that the writ should be granted; 3, that a limited injunction should be granted in the action."

I now proceed to deliver my own judgment. Two ladies, mother and daughter, of apparently some position in the county of Donegal, have been arrested by Free State troops, and are still kept in custody, awaiting a trial before a committee of Free State officers. It is

(1) [1902] A. C. 109. (2) [1921] 1 I. R. 265. (3) [1919] 2 Ch. 197.

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unnecessary for me to set out the charges in detail; they include charges of a most grave character, namely, of being in possession of bombs, explosives, firearms, and ammunition, the underlying suggestion being that the possession is for insurrectionary purposes. Some of the charges, if properly framed, at any rate, might be the subject of investigation by an ordinary criminal Court; some, I rather think, are not offences within the ken of the ordinary criminal law; the distinction is, in the view I take of the case, immaterial. The ladies, who strenuously deny the truth of the charges, applied to the King's Bench Division for a writ of habeas corpus, and also for an injunction in the terms of the writ in an action brought by them against the officers liable for their detention. Both applications having been refused, an appeal has been brought to this Court. The case involves questions of difficulty, and one, at least, of great constitutional importance.

The preliminary point has been taken that an appeal does not lie to this Court. It is argued, in the first instance, that an appeal does not lie, in any case, from a refusal of a writ of habeas corpus. This point, however, is really not open, for it has been expressly decided, both in the House of Lords—*Barnardo* v. *M'Hugh* (1); see also *Barnardo* v. *Ford* (2)—and in the Court of Appeal in this country—*In re Keller* (3)—that an order refusing a writ of habeas corpus is a "judgment or order" within the material section of the Judicature Act: in England, Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 19); in Ireland, Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57, s. 24); and that an appeal lies. The case which the Law Officer of the Provisional Government relies on, *Cox* v. *Hakes* (4), does not touch the question raised here; it only decided that where a prisoner had been discharged as the result of habeas corpus proceedings, no appeal lay from such an order, the foundation of the decision, in my opinion, being that the Court will not act in vain. But, then, it is argued by way of objection, both to the habeas corpus application and to the application for an injunction, that this is a "criminal cause or matter" within sect. 50 of the Judicature (Ireland) Act, 1877. In my opinion, this point has also been the subject of decision in *Clifford* v. *O'Sullivan* (5). That, it is true, was a case of prohibition, but the speech of Lord Cave on the question as to what is a "criminal cause or matter" is as applicable to a habeas corpus as to a case of prohibition. At pp. 580–581, Lord Cave thus enunciates the law (the case, as here, had reference to an intended trial by a body of military officers, acting in time of war, of certain charges): "In order that a matter may be a criminal cause or matter, it must, I think, fulfil two conditions which are connoted by and implied in the word 'criminal.' It must involve the consideration of some charge of crime, that is to say, of an offence against the public law ('Imperial Dictionary,' tit. 'Crime' and 'Criminal'), and that charge must have been preferred or be about to be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these condi-

(1) [1891] A. C. 388.
(2) [1892] A. C. 327.
(3) [1887] 22 L. R. Ir. 158.
(4) [1890] 15 A. C. 506.
(5) [1921] 2 A. C. 570.

tions are fulfilled, the matter may be criminal, even though it is held that no crime has been committed, or that the tribunal has no jurisdiction to deal with it (see *Reg.* v. *Fletcher* (1), per Amphlett J.A.; and *Rex* v. *Garrett* (2), per Bankes L.J.); but there must be at least a charge of crime (in the wide sense of the word) and a claim to criminal jurisdiction." After citing from the judgment of Brett M.R. in *Attorney-General* v. *Bradlaugh* (3), he says: "In the present case neither of the above conditions was fulfilled. The so-called 'military Court,' whose proceedings were in question before Powell J., was not and did not claim to be a Court or judicial tribunal in any legal sense of those terms. It was not a Court-martial, that is to say, a tribunal regularly constituted under military law, but a body of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of his commands contained in the proclamation, and of advising him as to the manner in which he should deal with the offences; and the 'sentences,' if confirmed, will derive their force not from the decision of the military Court, but from the authority of the officer commanding His Majesty's forces in the field." He goes on to say: "And as the so-called military Court was not a Court in any legal sense, so the charges against the applicants, which were not brought before that body, are not in any legal sense charges of crime."

I rather think that if I were disposed to scrutinize closely some at least of the charges brought against the appellants in this case, it might transpire that they were not, as framed, charges of crime in the ordinary sense; but as I think the second requisite is clearly absent, namely, a tribunal which has "a claim to criminal jurisdiction," and that the military tribunal is not "a Court in any legal sense," it is unnecessary to say anything further as to whether the charges are charges of ordinary crimes or not. For the reason stated—the non-existence of a "Court"—I am of opinion that this is not a "criminal cause or matter," and that therefore the appeal lies.

That being so, we are obliged to decide this appeal on its legal merits. Mr. Kennedy and his colleague have argued that a state of war—to wit, a rebellion against lawfully constituted authority—exists in Ireland, and that as long as such state of war exists the Courts of Law have no power to control or interfere with any action or course of conduct which the military authorities may choose to adopt to bring the country back to a state of peace. The general proposition on which this argument is based is beyond dispute so far as this Court is concerned; it was laid down by the Privy Council in *Marais' Case* (4), and adopted by the old Irish Court of Appeal in an unreported decision to which my colleague, Ronan L.J., and myself were parties. Difficulty, however, arises when we have to apply this principle to the action of the Provisional Government troops, and that difficulty turns upon the position in law which these troops occupy.

But before I come to that, I have to deal with an argument boldly advanced by Serjeant Hanna on behalf of the appellants. It was that there was no war in Donegal. To deal with that argument adequately, I have, to some extent, to draw, as I think I am entitled to do, upon my own knowledge of what is going on in the greater part of this

(1) 2 Q.B.D. 43, 47.
(2) [1917] 2 K.B. 99, 165.
(3) 14 Q.B.D. 667, 693.
(4) [1902] A.C. 109.

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island. The facts are within the knowledge of every man who has eyes to see and ears to hear.

I venture to think that the condition of things for some time past is without parallel in the history of any civilized country. On the one hand we have a community pursuing, in a fashion at all events, its ordinary course, producing and buying and selling. We have a Parliament, lawfully constituted, chosen by the people, exercising its functions within the limits of its powers; we have a Government responsible to that Parliament; we have our law Courts sitting and administering justice in all its branches in most parts of the country; we have the overwhelming mass of the people of this country peaceable and law-abiding, obedient to the Government, of whom they are themselves the masters, and ready and anxious to bear the burden and enjoy the privileges of citizenship in their new constitution; we have a large, uniformed, and apparently well equipped, ordered, and disciplined army, and a large police force, trained, or in process of being trained; we have the various functions of Government carried on, though in circumstances of great difficulty, as will appear. So far, there are all elements of peace and order. But that is only one side of the picture.

On the other hand we have a body of persons, small, no doubt, but making up in recklessness what they lack in numbers, determined, by any and every method in their power, to bring this country to a state of anarchy rather than submit to the will of the lawfully constituted and freely chosen Government of the country. These men are equipped with revolvers, rifles, and machine guns, and have the necessary implements, material, and skill for the manufacture of high explosives; they have no uniform. They are unevenly distributed over Ireland; they are here to-day, and away to-morrow; now and again they concentrate in certain localities in such force as temporarily to dominate the situation, but flee to the woods and hills upon the approach of the organized Government troops; mostly they carry on their operations as a sort of invisible army, posing as harmless citizens by day, and only venturing from their lurking places by night to work destruction and take life. They stop at nothing in their design; they attack the Government troops with bombs or gun fire; they shoot the unarmed civil police; they attack and destroy by mine, fire, or otherwise, buildings, both public and private; they explode roads, bridges, railway stations, signal cabins; they set trains at full speed along railways; here, in our capital city, the lives of nervous people are made intolerable by the din of their nightly performances; they inflict immeasurable loss and injury upon a peaceable community, in the supposed interest, be it observed, of that community.

This is a remarkable state of affairs. Is it war? I suppose there are many people who would say it was not—hesitating to dignify by the title "war" a state of circumstances in which there is little or no open clash of arms, and in which the attempt to coerce the will of others is carried on, not in the field, not in battle, but mainly, at any rate, in a surreptitious way by the commission of multiplied crimes. But we have to consider the question from its legal aspect; and, from that point of view, it is undoubtedly war—guerilla war, a sort of war perhaps, but war.

The test that I apply to determine whether war exists or no is this: Is the forcible resistance to authority so widespread, so continuous, so formidable, of such duration that the help of an army must be invoked, not merely in one or two instances, but habitually or constantly, lest the State shall perish? Tested in that way, there is no doubt that, in point of law, a state of war exists.

But it is said that a state of war does not exist in blameless Donegal. I am satisfied from what appears in the affidavits that have been read that it does exist in Donegal. Apart from that, where a state of war exists in a political unit of territory, I cannot discriminate between one portion of that territory and another; to do so would enable a rebel to claim immunity, in effect, the moment he escaped from a more or less disturbed county to a more or less peaceful one. So much for the question raised by Serjeant Hanna.

Now, there being a state of war, I come to the real crux of the case. Does the principle of *Marais' Case* (1) apply so as to exclude this Court from reviewing any military action taken by the Government troops in suppressing the rebellion? My mind wavered very much during the argument; but I have at length come to a clear conclusion upon it, and I am, at all events, fortified by the knowledge that it is the same conclusion as that arrived at by the Chief Justice, the Master of the Rolls, Mr. Justice Dodd, and Mr. Justice Samuels.

The way the case is put by the appellants is this: the Provisional Government is a Government, not for all purposes, but for some purposes only; neither under the Treaty Act nor otherwise has it any power to raise an army; an army was raised, no doubt, but this is a mere assembly of armed civilians; the right and duty to preserve order and to quell a rebellion remain where they always lay, in the British army; and, consequently, it is said, the doctrine of *Marais' Case* (1) has no application.

These contentions are true to this extent: that the Provisional Government has, to use the language of conveyancers, no paper title to raise or use an army. But that by no means disposes of the matter; many a title is good which is not a paper title.

Certain facts must be borne in mind in dealing with this question. The first is that the British army has been, in the main at all events, withdrawn from this country; and that such units as have remained have taken neither hand, act, nor part in the quelling the formidable and dangerous movement which I have tried to describe in an earlier part of this judgment. The second is that the Provisional Government troops have been openly, in great numbers, with every circumstance suggestive of a respectable field army, engaged in putting down the disorder, under the eyes and to the knowledge of the King's representative—the Lord Lieutenant of Ireland. And when I mention the Lord Lieutenant, I must be permitted to point out that, under his patent, he is responsible, under the regime which is now coming to a close, for the peace and order and good government of the country, and he is head of the naval and military forces in Ireland. It is, of course, inconceivable that this inaction of the British troops and of His Excellency as their head and as the custodian

(1) [1902] A. C. 109.

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of peace and order was per incuriam; it is still more inconceivable that the design was to allow us to be engulfed in the catastrophe which threatened us.

The fair and obvious inference is that to the Free State army was entrusted the work of quelling the rebellion. It is unnecessary to consider what form the delegation or transfer took, or what it should be called—call it what you will. I shall put it in terms that, I hope, will not offend the susceptibilities of any man, when I say that a mutual arrangement between the two countries was come to whereby the task of restoring order in Ireland was given to a body of Irishmen—to wit, the Free State army. If I am right in that, what more is to be said? It is not of the essence of the principle of *Marais's Case* (1) that the army which invokes the protection of that principle should be subject to this code or that code. It is sufficient that it should be an army properly authorized to undertake the task by those properly qualified to give such authority.

I am not greatly impressed by the suggested danger which may flow from this decision, for example, that any person who, exercising his rights as a citizen in arming himself and others to put down a rebellion might get immunity if the view I hold is correct. Not at all; I decide this case on its own circumstances, viewing them, I hope, reasonably and broadly; there is no warrant whatever for applying it in circumstances altogether different. In applying any principle, such as the principle involved here—salus populi, suprema lex—the facts in their entirety and full significance must be borne in mind; and doing my best to bear them in mind, and for the reasons stated, I have come to the conclusion that as long as this rebellion is raging the Courts have no power to interfere with the action of the Free State army in restoring order.

I am of opinion that the appeal should be dismissed with costs.

PIM J.:—

The law officer and counsel who appeared for the military authorities in this case, or, more correctly speaking, for the officer commanding Ardaravan House Barracks, near Buncrana, in the County of Donegal, have laid down three propositions. They are:—1, That an armed rebellion amounting to war is raging in the twenty-six counties in Ireland, called in the Government of Ireland Act, 1920, "Southern Ireland." 2, That during a war the Courts will not interfere with the military authorities, nor are they competent to inquire into the propriety of any of their acts. 3, That the military authorities now commanding the army of the Provisional Government are authorities with whom the Courts will not interfere, and into the propriety of whose actions the Courts are not entitled to inquire.

As to the first proposition the Court is unanimous. All the members of the Court agree that a rebellion amounting to war against the Provisional Government is being waged all over Southern Ireland, not excepting the County of Donegal. As to the second proposition, this Court is bound by its own decision to the effect that during a war the civil Courts will not interfere with the military authorities. It is around the third proposition that there has been so much discussion

(1) [1902] A. C. 109.

during the argument of this case. The point raised is serious, and by no means without difficulty, but it is in its essence a clear and definite point. To understand exactly its nature, it is necessary to take note of some facts of history.

Previous to the Treaty entered into on the 6th December, 1921, there had been in Ireland a rebellion amounting to war for some considerable period of time. Those who were waging this war in Ireland had formed an army with regiments and divisions, with officers of various grades, and a Commander-in-Chief. They had also set up a government, with ministers responsible to an assembly, and with ministries controlled and administered by the ministers. No one suggests that any part of the action of those who were conducting the rebellion was in any sense legal; but, in fact, the things existed. When the truce was declared in July, 1921, it was a truce between the British army and the army in Ireland; and when the Treaty was entered into, it was signed on behalf of Ireland by certain ministers forming part of the government in rebellion. The Treaty gave Ireland the status of a Dominion, with the name of the "Free State"; but, as the Free State could not come into existence immediately, it was by the 17th Article of the Treaty agreed that, by way of provisional arrangement for the administration of Southern Ireland during the interval which should elapse, a Provisional Government should be constituted, and that the British Government should take the steps necessary to transfer to such Provisional Government the powers and machinery requisite for the discharge of its duties.

Shortly after the signing of this Treaty the Provisional Government was constituted, and by sect. 1, sub-s. 2, of an Act called "The Irish Free State (Agreement) Act, 1922," it was enacted that, for the purpose of giving effect to Article 17 of the said Agreement, Orders in Council should be made transferring to the Provisional Government established under that article the powers and machinery therein referred to. By Order in Council, dated the 1st April, 1922, the King in Council transferred to the Provisional Government all the matters set out in the schedule thereto. Certain things were not transferred by that order, but, practically speaking, nine-tenths of the civil administration of Southern Ireland were by that Order in Council transferred to the Provisional Government. Unless the rather negative words in Article 9 of this order have that effect, there was no transfer of any power or machinery for creating an army or any force for the defence of the country; and if it be the law that there are no powers in the Provisional Government save such as have been definitely transferred by this order of the 1st April, 1922, there is no power in the Provisional Government to defend itself if it be attacked.

Now, the Provisional Government was set up by the authority of the Parliament of the United Kingdom and of the King, and when the British army retired from all parts of Southern Ireland except Dublin, all the military barracks throughout the country were transferred to the present army of the Provisional Government. The Government is technically the King's Government in Ireland, and the ministers responsible to it are technically the King's ministers in Ireland, for, so long as there is a King, ministers in any country of which he is King cannot be anybody else's ministers.

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There is now, therefore, in Ireland a "de facto" and de jure Government, with extended powers, administering almost all the interests and necessities of the country. There is also a "de facto" army subject to the Government and recognized by the King by his own acts. The army is composed partly of members of the old army which had existed previous to the Treaty, and partly of others who have since been enlisted. It is a genuine organized army, the same in essence as any army in any other part of the world.

It is suggested that, as no powers were transferred under which this army could be constituted, it is therefore wholly illegal. Is that so? Not long after the establishment of the Provisional Government a rebellion of no small scope and severity broke out in this country. Its ultimate object was the establishment of a republic in Ireland, and for that purpose its immediate object was the destruction of the Provisional Government. The Government at once took steps to protect itself and the country it was administering, and to repel force by force. I do not think any lawyer will deny that there is an inherent right at common law in every Government that may be attacked to defend itself, or that under the common law the Government were entitled to form an army—a force for the protection of itself and of the people committed to its charge. Not only had the Government the right to protect itself—to repel attacks on that which the King had established—but it was its bounden duty to do this, and in doing so to use any force which was necessary, and to call on all well-disposed persons to assist it. It required no transfer of powers to enable the Government to do this.

I now come to the part of the case in which the real question at issue arises. Granted, it is argued, that the Government had all these powers inherent in it, still, the army not being in the strict legal sense the King's army, the doctrine of *Marais' Case* (1) does not apply, and the Court is not precluded from inquiring into the doings of such an army.

I only desire to refer to two cases. The first is *Phillips* v. *Eyre* (2). In that case it appears that the defendant, who was Governor of Jamaica, had, when a rebellion broke out, "with the assistance and co-operation of the military and naval forces of the Queen and her faithful subjects in the island, by force of arms arrested the progress of the rebellion." These words I have taken from the pleadings in the case, but they have the same meaning as the words of Mr. Justice Willes, who delivered the judgment of the Court, when he says "that a rebellion broke out there which the Governor and others acting under his authority had arrested by force of arms." It is plain that the forces used in putting down the rebellion were partly composed of the Queen's forces and partly of others, and that the Queen's forces had not taken part of their own motion, but at the invitation of the defendant, and were acting under him. The defendant was indicted for certain alleged illegal acts which had taken place during the course of the insurrection, and he pleaded in defence an Act of Indemnity which had been passed by the Legislature of Jamaica. Mr. Justice Willes in his judgment speaks of the perilous duty which, in an especial degree, was incumbent upon the Governor, as being entrusted with the

(1) [1902] A. C. 109. (2) L.R. 6 K.B. 1.

powers of government for preserving the lives and property of the people and the authority of the Crown, and admits that it was his paramount duty to act speedily and promptly to cope with the rebellion; and he then adds, speaking of the measures which the Governor had taken: "The very efficiency of his measures may diminish the estimate of the danger with which he had to cope; and the danger once passed, every measure he has adopted may be challenged as violent and oppressive."

From this judgment, what appears abundantly clear is that Mr. Justice Willes was thinking, not of the particular means or troops used in coping with the rebellion, but primarily of the paramount duty of any Government to use any and all means to put down a rebellion. It is impossible—nay, absurd—to suggest that an act committed by an officer in the then Queen's army in coping with a rebellion could not be inquired into during the rebellion, but that the acts of certain volunteers called to his aid by the Governor could be. It has been suggested that in Ireland the forces of the Crown, which were still here when the rebellion broke out, might have been called upon to put down this breach of the peace as against the King. Apart from the absurdity of such a suggestion, and assuming that the authorities of the King's army had been willing to act under the Provisional Government, and to assist in quelling the rebellion, would it be possible to say that during the war no inquiry into the propriety of any of the actions ordered by a British officer was open to the Courts, but that it was open to the Courts to inquire into the acts of any Irish officers of the Provisional Government army who were employed doing the same work? Everything in Mr. Justice Willes's judgment seems to me to point to the fact that no matter who is employed by the Government in putting down a rebellion, whether it be the troops of the King or troops raised for the purpose in the locality, the Courts will not, during the war, interfere with them. It has been suggested that the law would cover even a roving band of individuals who, on their own responsibility, were attempting to put down a rebellion, but that question does not arise in this case, and I have no intention of dealing with it, nor was it necessary for counsel for the army authorities in Ireland to put forward any such contention. Their case is plain. It is simply this: that the forces of the Provisional Government come within the doctrine of *Marais' Case* (1). I find nothing in *Marais' Case* (1) itself which would limit the decision therein to the army of the King or to any particular army. Lord Halsbury's judgment contains the following passage:—"It may often be a question whether a mere riot or disturbance, neither so serious nor so extensive as really to amount to a war at all, has not been treated with excessive severity, and whether the intervention of the military forces was necessary; but once let the fact of actual war be established, there is a universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of"—not the military authorities—but "military authorities."

The statement could not be wider. Whether the military authorities are officers of the King, or officers acting under a Government established by the King, seems to me to make no difference. They

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are military authorities, acting for such Government during a war. They may do acts which are illegal, and which may be inquired into when the war is over if no Act of Indemnity be passed, but they are acts which, in the opinion of the military authorities—and they are the sole judges—are justified by necessity in the face of actual war.

The duties and rights of Government are various and often disputable, but I cannot imagine any person denying the right of every Government, no matter whether absolute or limited in power, to protect itself, and, in case of hostile attack, to meet force by force. On the contrary, not only its right, but its duty is clear; and if Courts were authorized to interfere with the acts which any such Government thinks it right to take during a war, it would make it impossible for it to carry out that which is its paramount duty.

In my opinion this Court has no right or power to interfere with the action of the military authorities of the Provisional Government in the war which is now being waged in this country; and, in consequence, I think the appeal should be dismissed.

Solicitor for the appellants: *Joseph H. Dixon.*
Solicitor for the respondents: *M. A. Corrigan*, Chief State Solicitor.

C. L.

COURTNEY *v.* COURTNEY (1).

Appeal.
(I. F. S.)
1922.
Nov. 24.
1923.
Feb. 8.
March 1.

Contract—Husband and wife—Agreement to separate—Agreement not to sue—Consideration—Subsequent proceedings for divorce a mensa et thoro—Effect of agreement—Bar to divorce.

A contract between spouses to live separate and apart is one which may be upheld and enforced. Such a contract need not be in any particular form provided there is evidence of an agreement made for valuable consideration; nor is it necessary that it should contain an express covenant not to sue to be a bar to subsequent proceedings for divorce, if that can be shown to have been the real character of the agreement entered into by the parties.

NEW TRIAL MOTION.

The respondent applied for an order that the decree or judgment directed to be entered on the trial of the action before Gordon J. and a common jury of the city of Dublin on the 20th and 24th days of July, 1922, should be set aside, and judgment entered in the action for him on the ground that on the finding of the jury in reference to the agreement entered into between the petitioner and the respondent, the learned Judge should have entered judgment for the respondent.

The plaintiff's petition, filed 2nd May, 1922, was for a divorce a mensa et thoro on the ground of cruelty. The nature of the cruelty alleged appears sufficiently for the purpose of this report from the pleadings set out in the judgment of Mr. Justice Dodd (infra).

At the trial of the action it was proved that the parties had agreed in May, 1921, in the presence of a priest, to separate, the respondent agreeing to pay the petitioner a sum of £150, and the petitioner to return to him a watch and her ring. Counsel for the respondent at the trial contended that the petitioner was estopped from taking divorce proceedings by this agreement, and submitted that nothing had occurred since to alter it.

The following questions were submitted to the jury, and answered as hereinafter mentioned:—

1st. Did the husband threaten to put a knife through his wife? Answer, "Yes."

2nd. If so, did this put the wife in reasonable apprehension that the husband would do her bodily harm? Answer, "Yes."

3rd. Did the husband knock the wife down at Freeman's, and was her head cut thereby? Answer, "Yes."

4th. Whether the husband has so treated his wife as to inflict bodily injury upon her, or cause reasonable apprehension of suffering or injury to her physically or mentally? Answer, "Yes."

5th. Did the wife and the husband in May, 1921, mutually agree to live separate, and not to molest each other, in consideration of the husband paying to the wife £150, she giving him her ring and

(1) Before MOLONY C.J., RONAN L.J., and DODD J.

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watch? Answer, "Yes." "'We do not believe the agreement of May, 1921, a good one,' and there being no evidence of consideration."

Upon the answers of the jury to the questions submitted to them, the Judge found that the respondent had been guilty of such cruelty towards the petitioner as would entitle the petitioner to a decree a mensa et thoro, and gave judgment accordingly.

Serjeant Hanna K.C. (with him *Geoghegan*), for the husband .—

The question is whether an agreement to live separately made between married people is a bar to subsequent proceedings in Court. In this case the Court ought to consider what the parties intended when they entered into the agreement. The evidence shows that the wife agreed to accept the lump sum of £150 to go away. It cannot be seriously argued that having accepted the money the wife could use it next day to start judicial proceedings. All the wife could get under a decree of the Irish Court was the right to live separately. That is secured to her by the deed. If the husband broke the agreement, the wife had her remedy by injunction.

Wood K.C. (with him *Lardner K.C.* and *Lavery*), for the wife :—

We submit that the terms of the agreement as found by the jury are no answer to the petitioner's claim for divorce. If there is an express covenant not to sue in a separation agreement, the Court will enforce the agreement, but in this agreement there is no such covenant.

In *Williams* v. *Williams* (1), and in *Moore* v. *Moore, Chadwick and Griffiths* (2), there was no covenant in the deed not to sue, and the separation deed was held not to be an answer to proceedings for judicial separation. In *Besant* v. *Wood* (3) there was a covenant not to sue, and the separation deed was held to be an answer.

[Authorities cited and discussed :—*Williams* v. *Williams* (1) ; *Moore* v. *Moore* (2) ; *Besant* v. *Wood* (3) ; *Matthews* v. *Matthews* (4) ; *Marshall* v. *Marshall* (5) ; *Clark* v. *Clark* (6) ; *Reeves* v. *Reeves* (7) ; *Bourne* v. *Bourne* (8) ; *Kennedy* v. *Kennedy* (9) ; *Wilson* v. *Wilson* (10) ; *Parkinson* v. *Parkinson* (11) ; *Crabb* v. *Crabb* (12) ; *Roe* v. *Roe* (13).]

Cur. adv. vult.

1923. Feb. 8. March 3.

MOLONY C.J. : In this case the judgment of the Court will be delivered by Mr. Justice Dodd.

DODD J. :—

This is a case of a petition by a wife for divorce from her husband on the ground of cruelty. It appears from the petition that Ellen Sullivan, a spinster, was on the 26th day of September, 1886, lawfully married to Michael Courtney, now of Ballynageann in the

(1) 1 P. & D. 178.
(2) 12 P. & D. 193.
(3) 12 Ch. Div. 605.
(4) 1 Sw. & Tris. 499.
(5) 5 P. D. 19.
(6) 10 P. D. 188.
(7) 3 Sw. & Tris. 139.
(8) [1913] P. D. 164.
(9) [1907] P. D. 49.
(10) 1 H. L. C. 538.
(11) [1869] L. R. 2 P. & D. 25.
(12) [1868] L. R. 1 P & D. 601.
(13) [1916] P. 163.

County of Monaghan, a farmer, at the Roman Catholic church of St. Vincent Ferrier, New York, in the United States of America. After the marriage the petitioner lived and cohabited with her husband in New York and subsequently at Ballynageann. The petition in paragraph 4 sets out the particulars of the alleged cruelty as follows :—

"During the past three years the said Michael Courtney has at many times been guilty of gross and persistent cruelty towards your petitioner, and in particular on the following occasions, that is to say :—In or about the year 1909 the said Michael Courtney several times accused your petitioner of having committed adultery with a servant man who had been living in the house, named Michael FitzPatrick. In or about the year 1910 the said Michael Courtney accused your petitioner of adultery with several men whom he named, and he refused to cohabit with your petitioner. On your petitioner denying these accusations, the said Michael Courtney threatened her with violence. From time to time the said Michael Courtney repeated these accusations. In the month of March, 1921, the said Michael Courtney returned home late at night, and your petitioner being alone and nervous until his arrival, asked him where he had been. He replied that she would not be in such a hurry if anybody was there, and that she was not in such a hurry the morning she left him standing on the road while she lay in the ditch with the servant man. Your petitioner said it was a lie, and he replied it was the truth, and said that if she denied it again he would put a knife through her. Your petitioner was greatly afraid, and left the house, and stayed in the house of Patrick Freeman, a neighbour, on that night. On the following morning your petitioner returned home, and was met by the said Michael Courtney with the same accusations and threats. Being in fear of personal violence, she left again, taking her personal belongings, and a sum of £170, and went to the same house. The next day the said Michael Courtney came to the said house, and shouted for your petitioner to come down with his £150. Your petitioner said she had £170—that she had a claim to it, as she had worked hard. He then struck her, knocked her down, and kicked her as she lay on the ground, and called her names . . . "

The petitioner then states she is unable to return to the house, is left without any means of support, and prays for relief.

The pleadings, as they stood originally, consisted of a traverse of the cruelty alleged, and a plea of condonation ; and the issues sent down for trial were—1, whether the respondent has been guilty of such cruelty towards the petitioner as would entitle the petitioner to a divorce a mensa et thoro ; 2, whether the alleged cruelty has been condoned by the petitioner ?

At the trial, Mr. Justice Gordon, the Judge who tried the case at Nisi Prius, in the exercise of his discretion allowed an additional plea to be pleaded relating to the separation contract between the parties. On that plea, the jury found a verdict presumably in favour of the respondent, with a rider which may or may not become material in the further consideration of the case. The learned Judge, however, gave a decree for the petitioner, and that decree is challenged before us on a new trial motion.

The case comes before the Court on a motion by the respondent that the judgment directed to be entered by the learned Judge at the trial (Mr. Justice Gordon) be set aside and judgment entered for the respondent on the ground that on the finding of the jury in reference to the agreement entered into between the petitioner and the respondent the learned Judge should have entered judgment for the respondent.

Two questions were argued before us :—1. Whether the agreement s good in law ? 2. Whether the evidence is sufficient to sustain

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the finding? It will be convenient to first ascertain the principle of law before applying ourselves to the evidence.

Upon the first question a great many authorities were cited, but the matter is concluded so far as this Court is concerned by the judgment of the Court of Appeal in Ireland in the cases of *McMahon* v. *McMahon*, *Purser* v. *Purser* (1), in which all the cases referred to in the argument before us were considered by the Chief Baron, with the exception of one mentioned at the last moment by Mr. Wood, which it will be necessary to consider later on. Palles C.B. gives an interesting historical survey of the principle from *Wilson* v. *Wilson* (2) down, an authoritative exposition of the ecclesiastical law, and a discriminating analysis of the effect of the common law and of the procedure under the Judicature Acts upon the principle; an illuminating judgment from one who, as we know, was as devout as he was erudite. Having examined the authorities, he says as follows, at p. 438 of the report. In view of the difficulty at present in consulting reference books, I think it right to read the entire passage:—

"In delivering judgment in *Hunt* v. *Hunt* (3), Lord Westbury, Lord Chancellor, says: 'Before the Reformation, as we all know, marriage was regarded by the Church, and therefore regarded by the law, as a sacrament. It was a contract of the highest possible religious obligation. All its duties and the obligations which it created were matters of ecclesiastical cognizance, and, above all, it is to be recollected, if I am not mistaken, that the duty of cohabitation—the primary duty arising from the contract—was enforced by the spiritual tribunal by spiritual punishments, acting as they did pro salute animae. It was therefore quite correct to say anterior to the Reformation, in speaking of the policy of the law, that voluntary separations were forbidden by law, and that contracts made for giving effect to voluntary separations were therefore invalid, as being contrary to the policy—that is, contrary to the prohibition—of the law. But then came the Reformation and the statute of Henry VIII, which, providing for that which unhappily never took place, the revision of the common law, enacted that the rules of the ecclesiastical law should prevail, as far as they were not contrary to the common law. The ecclesiastical law and the rules and doctrines of the Courts Christian were therefore subordinated to the common law, and what the common law did not prohibit in the ordinary relations of life could no longer be dealt with as an offence by the ecclesiastical law. As expressed by one of our older writers, the ecclesiastical law was thenceforth put sub graviore lege. Then, by the common law, voluntary separations, that is, the cessation by mutual agreement of the consortium vitae of matrimony, was not a thing forbidden, prohibited, or in any manner made the subject of punishment. It seems to me, therefore, impossible to say after the Reformation, *as a general proposition*, that voluntary separations were contrary to the policy of the law. It certainly was perfectly true that, inasmuch as the whole jurisdiction on the subject of marriage remained vested in the Courts Christian, and the power of instituting suits for the restitution of conjugal rights was retained by those Courts, and inasmuch as those Courts would not permit a contract of voluntary separation to be pleaded in bar of the right to interfere, as

(1) [1913] 1 I. R. 428. (2) 1 H. L. C. 538. (3) 4 De G. F. & J. 221.

they refused to countenance any separation that had not been pronounced by the authority of a spiritual Court, it was perfectly true to say that deeds of separation remained forbidden, that is, were treated as of no avail by the ecclesiastical law . . . But there being nothing to prohibit deeds of separation in the common law at a very early period (how early it is now impossible to ascertain) . . . deeds of separation with the covenants contained therein were recognized and treated as contracts capable of being enforced at common law.' Thus we had two jurisdictions, each acting on a different principle. Courts of Common Law, speaking generally, viewed contracts for immediate separation as legal. The Ecclesiastical Courts held any agreement for a separation, either immediate or future—any separation other than an immediate one under their own decree—illegal. To use the words of Sir W. Scott in *Mortimer* v. *Mortimer* (1): 'This Court [that is, the Ecclesiastical Court] considers a private separation as an illegal contract, implying a renunciation of stipulated duties, a dereliction from those mutual offices which the parties are not at liberty to desert—an assumption of a false character in both parties contrary to the real status personae—and to the obligations which both of them have contracted in the sight of God and man, to live together "till death do them part," and on which the solemnities both of civil society and of religion have stamped a binding authority from which the parties cannot release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient and sufficiently proved. These Courts, therefore, to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract, have uniformly rejected such covenants as insignificant in a plea of bar, and leave it to other Courts to enforce them so far as they think proper upon a more favourable view, if they entertain it, of their consistency with the principles of the matrimonial contract.'

"These two lines of inconsistent decisions at length came before the House of Lords in *Wilson* v. *Wilson* (2), when Lord Cottenham was Chancellor, one of the questions there being, whether a Court of Equity ought to entertain jurisdiction for performance of articles of separation; and that question was decided in the affirmative so far as the arrangement of the property agreed on.

"Later on this case came again before the House of Lords upon a question arising on the frame of the deed to carry out the articles of separation. It was heard before the then Lord Chancellor (Lord Cranworth), Lord Brougham, and Lord St. Leonards. Of these three learned personages, one, Lord Brougham, expressed his opinion against the soundness of the decision of the House. 'I also lament,' he says, 'that I had not the fortune to be present when this case was decided on the last occasion in this House, in the year 1848. I had heard a considerable part of the argument; and I certainly should not have been prepared, as then advised, and I will add, even as at present advised, to concur in that judgment of affirmance.' But I need not say that his disapproval was powerless to affect the decision.

"Specific performance of a contract for separation being thus held enforceable, so far as it regarded the property agreed to be settled, the

(1) 2 Hagg. Consist. Rep. 310. (2) 1 H. L. C. 538.

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further question arose in *Hunt* v. *Hunt* (1) whether the covenant, usual in those deeds, that the husband should permit the wife to live separate and apart, and that he would not take proceedings for restitution of conjugal rights, would be specifically enforced by injunction. The Lord Chancellor (Lord Westbury) decided this question in the affirmative. 'The long series of eminent judges,' he says, 'whose observations preceded the determination of the House of Lords,' in *Wilson* v. *Wilson* (2), 'are not to be weighed in the balance against the authority of that judgment; and if they are overborne or overruled by that judgment, they can no longer be cited with propriety to induce the Court to refuse to give effect to the clear principle and determination involved in that judgment; but I see in it no departure from principle, voluntary separation being no offence by the common law, however it may be regarded in a religious point of view. If it is not to be regarded as a civil offence against society, then the power to institute a suit for the restitution of conjugal rights is nothing in the world more than a private remedy and a private right belonging to the husband. The general maxim applies, 'Quilibet potest renunciare juri pro se introducto.' I beg attention to the words 'pro se,' because they have been introduced into the maxim to show that no man can renounce a right of which his duty to the public and the claims of society forbid the renunciation. But if this voluntary separation is a state of things which by the consent of the parties may be created, and created without offence, then it falls within the scope and ambit of the ordinary power of contracting, and there can be no difficulty upon principle or upon the ground of the policy of the law as to the validity of such a contract. These a priori reasonings are, however, altogether removed by authoritative decision, for if it be ever possible to find a judgment directly and conclusively upon the very subject before the Court, none could be found more conclusive or more cogent than the series of determinations arrived at by the House of Lords . . . The judgment remains a binding law upon all tribunals; they are bound to carry it to its legitimate consequences and effects; and upon its authority I at present feel myself compelled to give effect to this covenant . . .' The effect of the Judicature Act was to merge into the High Court both of the jurisdictions I have referred to; and since the decision of Sir J. Hannen in *Marshall* v. *Marshall* (3) a valid deed of separation is held available as a plea in bar in an action for restitution of conjugal rights. This language of Lord Westbury is an authority that such contracts as those in *Wilson* v. *Wilson* (2) and *Hunt* v. *Hunt* (1), i.e., contracts for immediate separation, are not against the policy of the law; and that the reason of that decision is that the rights of the spouses in respect of cohabitation have since the Reformation been no more than private rights which the spouses can validly renounce."

The Chief Baron then sums up the result in the question, "How, then, can it be the policy of the law that spouses cannot be free to contract that they will not cohabit?" (p. 443). Lord Justice Holmes and Lord Justice Cherry concurred.

It will, however, be of assistance to deal shortly with some of the cases in seeking to apply the principle to the facts of this case.

(1) 4 De G. F. & J. 221. (2) 1 H. L. C. 538. (3) 5 Prob. Div. 21.

The right is founded on contract. As appears from the Chief Baron's judgment, a voluntary separation of the spouses was not permitted by the ecclesiastical law; a separation without consideration cannot be enforced by the law of the land. What, then, amounts to a consideration?

The judgment of the Master of the Rolls, Sir George Jessel, in *Besant* v. *Wood* (1), is in point: "If a married woman can compromise a suit after she commences it, why not when she threatens it, or before she begins it? If after instituting a suit for a divorce or having a suit for divorce instituted against her, and she defending it, she can compromise by agreeing to live separate on terms as regards maintenance of herself, custody of her children, and so forth, why not before? Why not after the quarrel and before the litigation commenced? The very same reasons appear to me to apply to the one case as to the other. If the wife has the right to sue for restitution of conjugal rights, for separation or for divorce, if she has the right after beginning a suit to compromise the suit, she ought to have a right to do so before; and, if she has the right afterwards in the sense of being bound by her agreement, why should she not have the same right before as regards these matters as to which she has a clear right to institute the suit, these matters being matters of personal status, and the question that of living together or not? It seems to me to follow as a necessary corollary to the right to sue by herself that she must have the right to contract not to sue, and I should think that there would be no difficulty at all about it. I think that the law is, therefore, that a woman can contract to live separate and apart from her husband. That contract, like all other contracts, if not against public policy, is one which may be upheld and enforced."

The judgment in *Clark* v. *Clark* (2) is also of value. Lord Justice Bowen says (p. 195), alluding to the judgment of Sir George Jessel in *Besant* v. *Wood* (1): "I think that his reasoning cannot be shaken, that where a wife has power to sue her husband she must have power to compromise any such proceeding, or to bind herself to abstain from taking it"; and again (p. 195): "It is not necessary that an agreement should be in any particular form; all that is required is that there should be evidence of a contract into which the wife entered with her eyes open and for valuable consideration." Bagalley L.J. gave judgment to a like effect. Fry L.J. concurred without giving an independent judgment, but an interlocutory question by him is in itself almost a judgment. He asks, at p. 191: "The husband and wife being capable of contracting, is not the recital that they have agreed to live separate an agreement to do so?"

It is to be borne in mind that there must be a contract. A contract consists of a promise and a consideration. The agreement to refrain from taking proceedings was held to be a good consideration in *Wilson* v. *Wilson* (3). Mutual promises would not be enough. (See the judgment of Atkin L.J. in *Balfour* v. *Balfour* (4)). Having given a definition of what is "consideration" in general law, he says (p. 578): "It constantly happens that such arrangements made between husband and wife are arrangements in which there are mutual promises, or in

(1) 12 C. D. 605, at p. 622.
(2) 10 P. D. 188.
(3) 1 H. C. L. 538.
(4) [1919] 2 K. B. 571.

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which there is consideration in form within the definition that I have mentioned; nevertheless, they are not contracts, and they are not contracts because the parties do not intend that they should be attended by legal consequences." Warrington L.J. and Duke L.J. say the same, but Lord Justice Atkin's words are words of compressed clearness. These cases are of value in dealing with the case on which Mr. Wood so strongly relies, of *Moore* v. *Moore, Chadwick and Griffiths* (1). The case rightly read is, in my opinion, against Mr. Wood's contention. The Judge had some little doubt, which he solved in a way consistent with the decided cases on the terms of the deed. The husband was to allow the wife £2 10s. per month for her maintenance "so long as the separation continued." The deed did recite that the parties had "agreed" to live apart, that the wife had "agreed" to maintain herself out of her allowance and her own earnings without seeking to pledge her husband's credit. She further "agreed" not to take any of the children out of her husband's custody. The husband had deserted his wife in 1884. In January, 1887, the deed in question was executed. On April 27th, 1887, the husband brought the petition against his wife for adultery with two co-respondents. She denied the adultery, and presented a claim for desertion. The jury found for the wife on all the issues. The Judge held that there was no covenant in the deed not to sue, nor anything approaching to such a covenant, there was no condonation of past marital offences in the deed, and no expression pointing to condonation. He distinguished the cases cited on the ground that in them there was an agreement to live apart before the two years' desertion was completed, and that there was condonation, and a covenant not to sue. The lady could not have relied on desertion after the deed, but the Judge held that the matrimonial offence of desertion had been completed before the deed, and had not been condoned. The deed contemplated the continuance, not the severance of the marital relations. "So long as the separation continued" she was to get so much money, and was not to pledge the husband's credit. There was no contract further or other, and the husband's case was altogether devoid of merits. It was significant that the deed was made in January, the husband proceeded against his wife in April, and pleaded this deed as an answer to her claim against him. Any Judge of astuteness would have had no difficulty in making law and justice meet in his decision. The separation was not a part of the contract. The deed gave maintenance to a deserted wife, who had been deserted for three years. The case turned upon its special facts and the construction of an unusual deed. It escaped the Chief Baron's research, or was not considered by him as having any value. It is not referred to in any other case that I have been able to discover, but it is an authority against Mr. Wood on the facts here if the view I take of them be correct. If I find here that preceding matrimonial offences had been included in the bargain, and that the bargain was to put an end to them once and for all, and that the parties should live separately, then the decision in *Moore* v. *Moore, Chadwick and Griffiths* (1) is that such a bargain will be held binding on both spouses, and cannot be put an end to save by a rescission of both contracting parties. (See judgment of Mr. Justice Shearman in *Roe* v. *Roe* (2).)

(1) 12 P. D. 193.

(2) [1916] P. 163.

The law being, as I think, clear, and the cases cited giving a guide in applying it, the sole question of fact here is, on the plea which the learned Judge at the trial allowed to be pleaded, and on which he framed question 5: "Did the wife and the husband in May, 1921, mutually agree to live separate, and not to molest each other, in consideration of the husband paying to his wife £150, she giving him her ring and watch?"—to which the jury answered "yes." They added a rider: "'We do not believe the agreement of 1921 a good one,' and there being no evidence of consideration." It is not clear whether the words "and there being no evidence of consideration" were parts of the rider or were added by the Judge. That is not material.

It is for the Court to say now whether there was evidence of consideration moving from the wife. It is on this that the weighty words of the Judges in the cases cited become applicable. In *Wilson* v. *Wilson* (1), Vice-Chancellor Shadwell, whose judgment was upheld in the Lords, decided that the promise of the wife not to bring proceedings in the Ecclesiastical Court, which the husband was most anxious to avoid, was sufficient consideration. In *Besant* v. *Wood* (2), we have Sir George Jessel's judgment that a compromise of a matrimonial quarrel before proceedings were taken was a good consideration for a contract. We have the concluding words of the Chief Baron's judgment in *McMahon* v. *McMahon* (3): "Can it be the policy of the law that spouses cannot be free to contract that they will not cohabit?" and Lord Justice Bowen's words: "All that is required is that there shall be evidence of a contract into which the wife entered with her eyes open, and under which she has received benefits."

Now what was the contract between the parties in this case? Let me read the exact words from the evidence of Father Courtenay, the curate of the parish in which the parties reside, as there was some controversy during the argument as to what the agreement was:—"I arranged for the parties to meet in Kennedy's office. He was giving her £100. I said he ought to give her more. She said that she would sooner than be fighting take £100. I said it wasn't sufficient. I tried to knock £50 more out of him. It was all I could get. He would not give any more. He wanted the ring back. She refused to give it. I saw it would break off the settlement, and I advised her to give it. She held her hand out and told him to take it off. He wanted a watch. She said she hadn't it. £10 was left with me till he would get the watch, and I afterwards gave this £10 to Mrs. Courtney." The rev. gentleman does not say whether the husband took the ring off or not, but the inference is he did.

The £150 was given to the lady, and in May, 1921, the following form of receipt with a 2*d.* stamp, was signed by her, "Mrs. Courtney."

"Received from Mr. Michael Courtney the sum of one hundred and fifty pounds (£150), being in full discharge of all claims of every nature and kind by me against the said Michael Courtney."

When this contract was entered into the wife was in a position in which she could have sued her husband. What relief could she get in a suit? A separation from bed and board, and an allowance from the Court from the husband's means for alimony. The allowance would have been in the usual practice granted as an annual payment; that it

(1) 1 H. L. C. 538. (2) 12 Ch. Div. 605. (3) [1913] 1 I. R. 428.

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was arranged for between the parties to be granted at once as a lump sum in this case throws light upon the intention of the parties. It was to be given once and for all—no further dealings. The consideration from the wife was that if the husband agreed to the terms she would abstain from bringing proceedings for separation or for alimony. She got the money, for what? It was not damages for prior assaults. It was in settlement of all claims. The handing back of the ring was a most significant matter. The husband stipulated for that. The watch, too, seems to have had some sentimental significance, if sentiment can be attributed to such a pair, but the husband's view apparently was to terminate once and for all matrimonial relations. Her desire was apparently to retain the ring as she would preserve her marriage lines. But the priest advised her to give it back. She wished still to be a married woman. She got a new ring, and the priest blessed it. Apparently the watch was also given back, for the priest gave the £10 to the wife, a receipt was given for the £150, and Father Courtenay said, in answer to the Judge, "I understood that unless they agreed to come together again this settlement was an end of everything." Was this merely an arrangement between spouses such as Lord Justice Atkin referred to, or was it "intended to be a bargain"? Could she the next day have brought a matrimonial suit? The priest thought the lady ought to have got more. The jury also thought so; but did she conclude the contract with her eyes open? Can she keep the £150 and still sue?

It is said there is no express covenant not to sue, no agreement not to sue to be implied. But if parties who are free to contract do, in fact, contract for the settlement of an action or for the abandonment of claims which might terminate in legal proceedings, can it be contended that the settlement having been entered into and completed by one party complying with it, the other party can keep the money and go on with an action? The contract need not be under seal, nor take the form of a covenant, nor need it necessarily be in writing, though it is hardly conceivable that there should not be some documentary evidence forthcoming in such an issue, nor need the bargain, that no proceedings are to be taken, be put in express words, though here again caution is required to ascertain the real nature of the transaction. A matrimonial tribunal must bring to the consideration of such a case great circumspection, and must not lightly sanction the severance of the marriage tie; but when all this is said and the tribunal is satisfied that the transaction was a binding contract, parties to it who agree so to settle a matrimonial controversy must be taken to contract that they will not go behind the settlement, and cannot be listened to saying that they did not make an express stipulation not to sue. The decision here must be kept within its legitimate limits, and is not to be taken to extend to contracts that are against the public policy. (See the earlier part of the judgment of Palles C.B. in *McMahon* v. *McMahon* (1), where he deals with contracts that are against public policy.)

I do not discuss a question not raised on the pleadings, and, as the Chief Justice pointed out in the argument, not covered by any question to the jury as to alleged cruelty after the separation. There is, in addition, a substantial reason for not dealing with it. It was during

(1) [1913] 1 I. R. 428.

the negotiations and before the conclusion of the bargain that the kick on the shin was given, but cruelty must be cruelty that would, in matrimonial life, have put the wife in reasonable apprehension. Here the matrimonial life was at an end. The incident might have been of moment if it could be alleged that it was coercion to compel her to enter into the bargain. She had substantially made a bargain and had agreed to give back the ring and watch. No case of coercion has been made or could be made upon the facts. Her priest was her counsellor, and got the best bargain for her he could get.

The law in the Matrimonial Court still operates in some particulars against the husband. There is a continuing order in this suit for the husband to pay the costs of the wife, and the practice still prevails that a husband who succeeds is yet bound to pay his wife's costs. The Matrimonial Judges have endeavoured to modify the stringency of this rule, and in exceptional cases, as where the wife has separate goods, depart from it. The wife here has no separate estate; the money she got was in lieu of alimony, and there are no exceptional circumstances affording grounds for departing from settled practice as to costs. It is rather the other way: the husband has failed completely on the question of cruelty; the agreement was not pleaded until all the cost had been incurred. If he had been more generous in his bargain, he would have probably escaped. On the whole, perhaps, something not quite unjust has resulted. The decision, in my opinion, should be reversed, but the husband must pay the wife's costs.

RONAN L.J.*:—

I am of the same opinion; I just wish to add one or two words to the elaborate and conclusive judgment just read. The fourth question put to the jury was: "Whether the husband has so treated his wife as to inflict bodily injury upon her, or cause reasonable apprehension of suffering or injury to her physically or mentally?" and the jury answered in the affirmative. It will be observed that in that question there is no reference to whether this conduct of the husband took place prior to or after the agreement. Serjeant Hanna being apprehensive that it might be argued that the cruelty was subsequent to the agreement, and wishing to meet that contingency in case it arose, argued with great force that even if there was cruelty subsequent to the date of the agreement the only remedy the wife would have would be the right of the ordinary citizen at common law. That question does not arise before us for decision, as the Lord Chief Justice, after a careful examination of the evidence, pointed out towards the close of Serjeant Hanna's argument that it was clear the cruelty was anterior to the agreement. There was no evidence of cruelty after the agreement. The petition is based on the same class of facts. Therefore, the case only deals with cruelty anterior to the agreement. The position in which this lady was under the fourth finding of the jury, was that she had a right then to bring proceedings for judicial separation. She has brought proceedings for judicial separation, and the defence to these proceedings is, in a word, that she had agreed not to bring them.

* This judgment has not been revised by Ronan L.J.

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Mr. Wood did not at all dispute the conclusion which the Lord Chief Justice had drawn from the evidence. His argument was short and specific. He contended that there must be an express agreement not to sue. The jury found that in May, 1921, the husband and wife agreed "to live separate and not to molest each other in consideration of the husband paying to the wife £150—she giving him her ring and watch." If that stood by itself, it would be a complete answer.

It is quite true that a mere agreement not to molest is not broken by bringing a bona fide matrimonial action. But they agreed to live separate and apart, and that she was to take £150 in full settlement. That £150, having regard to the fourth finding, put an end to her rights in respect of antecedent cruelty. The jury, however, answered: "'We do not believe the agreement of May, 1921, a good one,' and there being no evidence of consideration." I should read all that together. Under the old law, a mutual promise to live separate and apart was not sufficient consideration for an agreement of this nature. That law has been absolutely changed. The passage which Mr. Justice Dodd referred to from the judgment of Atkin L.J. really only amounts to this, that the parties should intend that the contract should have a legal result. When we were students we used to be taught that one of the essential conditions of a contract was that the parties intended that it should have a legal result. The old illustration given was that if a man asks you to dinner and you accept the invitation, and go to the house and then get no dinner, you cannot bring an action. In the same way a promise made between husband and wife, if not intended to have a legal effect, will not constitute a legal contract. In these circumstances, the only remaining question is the question of fact, and Mr. Justice Dodd has shown conclusively in point of substance, and as a matter of fact, that this contract, which does not require to be under seal or in writing, was an agreement between the parties that there was to be no more between them, and the lady accepted £150 in respect of past damage and all her rights.

Solicitor for the petitioner: *John J. Early.*
Solicitor for the respondent: *Andrew A. Wells.*

H. J. M'C.

McNEANY *v.* MAGUIRE.

(1922. No. 29A.)

Irish Free State.

K. B. Div.
(Probate.)
Dodd J.
1923.
Feb. 16, 23.

Probate—Practice—Plaintiff next-of-kin and caveator out of the jurisdiction—Security for costs.

The making of an order that a plaintiff resident out of the jurisdiction shall give security for costs rests solely in the discretion of the Court.

In the exercise of such discretion, three elements should be taken into consideration:—1, that an Irish-born subject is entitled to sue as of right; 2, that mere absence does not disqualify him; 3, that the Court should consider all the circumstances.

SUMMONS.

The plaintiff, who was one of the next-of-kin of Patrick McNeany, deceased, and as such had entered a caveat, was resident in the United States of America. He issued a writ claiming to have an alleged will of the deceased dated 7th July, 1922, condemned, the defendant being the executor named in the said will. The defendant now applied for an order that the plaintiff should give security for the costs of the action, on the ground that he was resident out of the jurisdiction and had no property within the jurisdiction.

Lavery, for the defendant.

Marnan, for the plaintiff.

Cur. adv. vult.

DODD J.:— Feb. 16.

This case comes before me on an application by the defendant that the plaintiff be ordered to give security for the costs of the action. The plaintiff, whose residence is in America, is one of the next-of-kin of the deceased, and as such asks the Court to condemn the deceased's will, the defendant being the executor named in the said will. I had hoped from a survey of the authorities to get guidance on the point, but I can find no firm or fixed rule. Accordingly I must fall back on the old procedure. In this matter of security for costs almost every division—King's Bench, Common Pleas, Exchequer, Probate, and Admiralty—adopted a different course of practice. The most illuminating reading concerning the practice on the Probate side is to be found in the very learned judgment of Dr. Radcliff in the old Prerogative Court in the case of *Furnell* v. *Stackpoole* (1), where the history is admirably set out. He says the practice is founded on precedent and not on principle. The subject also came before Porter M.R. in *Crawford* v. *Irwin* (2), and before the Court of Appeal in *FitzGerald* v. *FitzGerald* (3).

(1) Millward's Reports, 271. (2) 1 N.I.J.R. 64. (3) 29 I.L.T.R. 125.

Irish Free State.

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There is no basic principle to guide us; the matter is one solely for the discretion of the Court, and the different Courts have exercised their discretion in varying fashion. But in exercising its discretion the Court must take three elements into account: first, that an Irish-born subject is entitled to sue as of right; secondly, that mere absence does not disqualify him; thirdly, that the Court has the right to consider all the circumstances. Am I to exercise my discretion in this case against the plaintiff? The law favours those who appeal to the Courts. This case comes before me on special facts. The plaintiff, though resident in America, is an Irish-born subject, who, if living here, could sue of course without being put to the necessity of giving security; moreover, he has entered a caveat. He shows a good fighting case in his affidavit. Upon the particular facts of this case I, exercising my discretion, refuse the defendant's application. I shield myself behind the precedent of Andrews J.: *In the Goods of Twomey* (1).

I make no order as to the costs of the motion; they will be dealt with by the Judge at the trial.

Solicitors for the plaintiff: *Phelan & Co.*
Solicitor for the defendant: *Patrick Marron.*

T. C. T.

(1) [1900] 2 I.R. 560.

GEORGE ELLIOTT *v.* WILLIAM E. ELLIS (1).
(1922. No. 4,119.)

Appeal.
(I. F. S.)
1922.

Nov. 7.
Dec. 21.

Landlord and tenant—Increase of rent—Notice of increase—Validity—Disputed items—Agreement between parties—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *sect.* 2, *sub-s.* 1 (*a*) *and* (*d*); *sect.* 3, *sub-s.* 2; *First Schedule.*

A notice in writing of a landlord's intention to increase the rent of a dwelling-house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies, served by him upon the tenant, claimed increases under the four statutory heads. The tenant denied liability in respect of improvements under sect. 2, sub-s. 1 (*a*), of the Act, contending that his liability under sect. 2, sub-s. 1 (*d*), should be reduced by half because he was expressly bound under the tenancy to execute internal repairs. By agreement between the parties the claim under (*a*) was abandoned, and that under (*d*) was reduced by half. Upon a motion for final judgment for rent due, the tenant made the case that the notice was invalid, because the figures to which he had agreed did not correspond with the figures which were set out in the notice.

Held (affirming the King's Bench Division), that the notice was not invalid. *Penfold* v. *Newman* ([1922] 1 K. B. 645) discussed.

APPEAL from an order of the King's Bench Division granting final judgment for £35 10*s.* 1*d.*, being six months' rent from 1st April, 1922, to 30th September, 1922, of No. 8 Upper Garville Avenue, Rathgar, held by the defendant from the plaintiff under a tenancy from year to year, arising on the termination of a three years' letting made on December 15th, 1916.

The action was brought to recover £40 1*s.* 9*d.*, including £4 11*s.* 8*d.* for the month of May, 1920; £6 0*s.* 11*d.* for the month of April, 1922; and £5 17*s.* 10*d.* for each of the succeeding five months. The standard rent was £52 a year. Under the agreement made on December 15th, 1916, the defendant held the premises for a term of three years from January 1st, 1917, at the yearly rent of £55, free of rates and taxes, payable monthly on the first day of each month. By this agreement the tenant undertook to keep the inside of the house, and the landlord the roof and outside in good order and repair. The rent of £55, which was £3 more than the standard rent, was proposed by the tenant. On the expiration of the term the landlord served notice under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, increasing the rent. The increases demanded by the landlord under sect. 2, sub-s. 1, of the Act were as follows:—(*a*) Six per cent. on £70 stated to have been spent on improvements, £4 4*s.*; (*b*) increase in rates, 1920-21, £7 10*s.*; (*c*) five per cent. on net rent of £38 10*s.*, £1 18*s.* 6*d.*; (*d*) twenty-five per cent. on same, £9 12*s.* 6*d.* These increases brought the total amount of the rent claimed up to £75 5*s.*

The defendant made no objection to the increases demanded under heads (*b*) and (*c*), but submitted that the demand under (*a*) was untenable, as the outlay referred to was on sewage renewal, and could not be deemed expenditure on "improvements." He claimed that the demand under (*d*) should be reduced by half, as he was expressly liable

(1) Before MOLONY C.J., and RONAN and O'CONNOR L.JJ.

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ELLIOTT *v.* ELLIS.

for half repairs. A correspondence as to the exact amount of rent took place, and it was ultimately agreed that the rent should be £6 0*s.* 11*d.* from August 1st, 1921. Subsequently the rates were reduced, and the defendant having brought this fact to the notice of the plaintiff, the latter agreed to reduce the rent accordingly, and to accept £5 17*s.* 10*d.* per month from May, 1922.

In his affidavit stating that he had a good and valid defence to the action, the defendant submitted that the plaintiff never served a valid notice on him in pursuance of the Act, and that the plaintiff did not obtain or seek to obtain, as provided for by sect. 2, sub-s. 6, of the Act, any order or declaration from the County Court in relation to the questions at issue as to the amount of rent legally payable. He also made the case that the landlord did not carry out his obligation to execute external repairs.

Gleeson, for the appellant, the tenant :—

The notice under which the rent is claimed is invalid. If the statutory notice demands under any head anything in excess of the permitted increase, the whole notice is bad: *Penfold* v. *Newman* (1). Sect. 3, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), enacts that the notice shall be in the form contained in the First Schedule to the Act, or in a form substantially to the same effect.

James Henry, for the respondent, the landlord :—

The parties having agreed as to the amount of rent properly payable, and the defendant having actually paid at that rate the rent which accrued before the period in respect of which the claim in the writ is made, he cannot now challenge the validity of the notice.

Dec. 21.

MOLONY C.J. :—

This is an appeal from an order of the King's Bench Division granting final judgment for £35 10*s.* 1*d.*, being six months' rent of No. 8 Upper Garville Avenue, Rathgar, which is held by the defendant from the plaintiff under a tenancy from year to year, arising on the termination of a three years' letting made on the 15th December, 1916. The rent claimed is £6 0*s.* 11*d.* for the month ending 1st April, 1922, and £5 17*s.* 10*d.* for each of the five succeeding months.

The defendant has put in an affidavit contending that the rent is not lawfully due by him in accordance with the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, inasmuch as the plaintiff never served a valid notice upon him in pursuance of the Act, and he relies upon the case of *Penfold* v. *Newman* (1) as an authority in his favour.

I have carefully read the correspondence in the case, and it is clear that the rent has been calculated in strict accordance with the contentions of the defendant.

In the first instance the plaintiff served the statutory notice claiming to be entitled to four statutory increases under sect. 2 of the Act, namely, £4 4*s.* under sect. 2 (*a*); £7 10*s.* under sect. 2 (*b*); £1 18*s.* 6*d.* under sect. 2 (*c*); and £9 12*s.* 6*d.* under sect. 2 (*d*).

(1) [1922] 1 K.B. 645.

It appears from the statement furnished by the defendant to the plaintiff's solicitors on the 23rd November, 1921, that the defendant denied his liability under 2 (*a*); admitted it under 2 (*b*) and (*c*); and contended that his liability under 2 (*d*) was to be reduced by one-half in consideration of his being expressly liable for internal repairs. On this basis the defendant himself made out the statement (Statement "B") which he furnished to the plaintiff, showing that his rent as from the 1st August, 1921, was £6 0*s.* 11*d.* per month, and a reduction in the rates having taken place he notified the plaintiff that his rent as from the 17th of May would be £5 17*s.* 10*d.* per month. The plaintiff accepted this statement and reduced the rent accordingly, and it so appears in the writ.

There is, consequently, a full agreement between the parties as to the rent properly payable, but the defendant contends that he is not liable because the figures to which he has agreed do not correspond with the figures which were set out in the notice, as the notice claims a sum under 2 (*a*) which was subsequently abandoned, and claims a sum in respect to 2 (*d*) which was subsequently agreed to be reduced by half.

In *Penfold* v. *Newman* (1) a mistake was made as to the amount of the increase under 2 (*c*), but the amount claimed in the present case under 2 (*c*) is admittedly correct, and Shearman J. in his judgment, while he holds that a mistake as to the amount claimed under 2 (*c*) is fatal, expressly disclaims deciding whether the same principle applies to 2 (*a*), (*b*), and (*d*). In *Penfold's Case* (1) the defendant declined to pay the increased rent under the notice, while in the present case the defendant has not only arrived at an agreement with the plaintiff as to the amount properly payable, but has in fact paid the rent which accrued due before the present proceedings at the same rate that he is now sued for.

I entertain some doubts as to whether *Penfold* v. *Newman* (1) was correctly decided, but in any case I am of opinion that it is not applicable to the present case, where the net point decided in *Penfold's Case* (1) does not arise, and where in fact there was an agreement as to the proper amount of the rent.

The defendant also contended that the plaintiff did not carry out his obligation to execute external repairs, but this is disputed, and in any event the contention is no answer to the present application, as the defendant has not applied under sect. 2, sub-s. 2, to the County Court for an order suspending the increase claimed under sect. 2 (*d*).

In my opinion the plaintiff is entitled to judgment, and the appeal should be dismissed with costs.

LORD JUSTICE RONAN and LORD JUSTICE O'CONNOR, who are unable to be present, have asked me to say that they concur in the result.

Solicitor for the appellant: *James Brady.*
Solicitors for the respondent: *Joynt & Crawford.*

C. L.

(1) [1922] 1 K. B. 645.

Appeal.
(*N. I.*)
1922.

SCARLETT, Applicant; FERMANAGH COUNTY COUNCIL, Respondents (1).

Oct. 26.
Dec. 12.

Malicious injury—Kidnapping—Injury to health caused by exposure—Compensation—Criminal Injuries (Ireland) Act, 1919 (9 *Geo.* 5, *c.* 14), *sect.* 1, *sub-s.* 1 (*b*); *Grand Jury (Ireland) Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 106—*Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97).

A number of armed men captured the applicant within the borders of the County Fermanagh, and at once removed him to Southern Ireland, where he was detained for nine days. His general health was impaired as a result, but he suffered no objective physical injury.

Held, that the applicant was not entitled to compensation in respect of injuries to his general health caused by exposure and the treatment to which he had been subjected.

Appeal by James Scarlett by way of case stated from an order of Moore L.J., made at the Summer Assizes, 1922, for the County Fermanagh, affirming the dismissal by the County Court Judge of an application for compensation under the Malicious Injury Code.

The case stated set out the facts as follows:—

1. Prior to the 7th day of February, 1922, the applicant had been suffering from influenza, and had been confined to his house during the day of the 7th February and for the two previous days. On the night of the said 7th February the applicant left his house and went for a doctor to attend two persons who had been shot, and to give information to the police, and when returning home in the police Crossley tender they were ambushed and fired on at Wattle Bridge, in the County of Fermanagh, and within one mile of the County of Cavan, by a party of armed men exceeding three in number, and the applicant, together with some of the police, was taken prisoner.

2. The applicant was blindfolded, and was placed in a motor conveyance and was driven without any overcoat to Ballybay, in the County of Monaghan, which is over forty miles distant from Wattle Bridge. He was imprisoned with others in an uninhabited house at Ballybay, and the only sleeping accommodation supplied was one damp mattress and one blanket for every three persons. He was subsequently taken to Bailieborough, in the County of Cavan, and to Trim, in the County of Meath, and was imprisoned in each of those towns, and treated in the same manner as at Ballybay, and was released after nine days' imprisonment. He suffered no physical injury save the discomfort of imprisonment, and that his general health was temporarily injured by the exposure and treatment to which he was subjected in the Counties Cavan, Monaghan, and Meath.

3. I affirmed the dismiss made by the County Court Judge, but without costs, on the ground that the applicant had not been injured in his person within the meaning of sect. 1, sub-s. 1 (*b*), of the Criminal Injuries (Ireland) Act, 1919.

(1) Before Henry C.J. and Andrews L.J.

Appeal.
(*N. I.*)
1922.

SCARLETT
v.
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4. On the application of counsel for the applicant I agreed to state a case for the opinion of the Court. The question for the decision of the Court is :—

Whether on the facts the applicant was maliciously injured in his person within the meaning of sect. 1, sub-s. 1 (*b*), of the Criminal Injuries (Ireland) Act, 1919.

Babington K.C. and *M'Dermott*, for the applicant :—

Under sect. 106 of the Grand Jury (Ireland) Act, 1836, compensation is payable in certain cases to persons maimed and to the personal representatives of persons murdered ; and the Legislature by adding in sect. 1, sub-s. 1 (*b*), of the Criminal Injuries (Ireland) Act, 1919, to the words "murdered" and "maimed" the words "or maliciously injured in his person" widened the class of injury for which compensation is recoverable so as to include injury to health though unaccompanied by any outward objective injury. Compensation is not restricted to objective physical injury : *Kennedy* v. *Limerick County Council* (1). Whatever injuries applicant received were malicious. The arrest of appellant and detention of his person was an assault. It is a common law misdemeanour to imprison any person without lawful cause : Halsbury, Laws of England, vol. ix, p. 606. The appellant was continually being injured during the whole of the nine days' detention. If what caused the injury is a crime, then the injured person is entitled to recover ; he is a person who has been maliciously injured in his person. Moore L.J. was wrong in finding that there must be an act of murder or maiming. The applicant is entitled to apply in the county where assault was originally committed. Although the assault was a continuing transaction, the inception took place in County Fermanagh.

The applicant suffered an injury to health ; this is as much a personal injury as nervous shock, and such shock has been repeatedly held to be as much a personal injury as visible bodily damage : *Dulieu* v. *White* (2) ; *Yates* v. *South Kirby Collieries, Ltd.* (3) ; *Bell* v. *Great Northern Railway Co. of Ireland* (4) ; *Wilkinson* v. *Downton* (5). Further, the words "maliciously injured in his person" are wide enough to include wrongs done to the person ; and here the applicant already suffered a tort which was also a crime.

Murphy K.C. and *M'Guckin*, for Fermanagh County Council :—

The decision of Moore L.J. should be affirmed. In the case stated it was found that there had been no physical injury. Discomfort is not a malicious injury to the person ; and applicant cannot succeed unless such injury is proved. If applicant is to succeed, physical discomfort must be read ejusdem generis with murder, maiming, and malicious injury to the person. It would be widening the field very much if malicious injury to the person is to be read as extending to any form of physical discomfort. Further, the physical discomfort was not the natural and probable consequence of the imprisonment and assault. Again, the temporary injury to the applicant's general health occurred outside County Fermanagh.

(1) 3 N. I. J. 87.
(2) [1901] 2 K. B. 669.
(3) [1910] 2 K. B. 538.
(4) 26 L. R. Ir. 428.
(5) [1897] 2 Q. B. 57.

BIBL. LONDIN. UNIV.

Appeal. (*N. I.*) 1922. SCARLETT *v.* FERMANAGH CO. COUNCIL.

M'Coy, for Tyrone County Council :—

The definition of what constitutes being "maliciously injured in his person" has never been extended beyond bodily injuries; the only extension was from maiming to wounding. Whatever injury had been caused to applicant's health was the result of the exposure in Cavan, Monaghan, and Meath.

Babington K.C., in reply :—

If a man suffer from some form of injury as the result of a crime committed upon him, surely this is as much a malicious injury as any form of maiming or wounding. The injury received was a direct result of the crime; it is a malicious injury under sect. 1, sub-s. 1 (*b*), of the Criminal Injuries (Ireland) Act, 1919, and no authority has been cited for limiting the section by the ejusdem generis rule.

ANDREWS L.J. delivered the judgment of the Court as follows :—

On 7th February, 1922, the applicant, who had not fully recovered from an attack of influenza, left his home in search of a doctor to attend two persons who had been shot, and to give information to the police. When returning with the police in a Crossley tender they were ambushed at a point in the County of Fermanagh situate within one mile of the County of Cavan by a party of men exceeding three in number, and the applicant, with some of the police, was taken prisoner. He was driven without any overcoat to Ballybay, in the County of Monaghan, over forty miles distant, and was subsequently taken to Bailieborough, in the County of Cavan, and to Trim, in the County of Meath, and was ultimately released after nine days' imprisonment. He suffered no physical injury save the discomfort of imprisonment, but his general health was temporarily injured by the exposure and treatment to which he was subjected in the Counties of Cavan, Monaghan, and Meath.

The question for our decision is whether on the facts mentioned the applicant was maliciously injured in his person within the meaning of sect. 1, sub-s. 1 (*b*), of the Criminal Injuries (Ireland) Act, 1919, it being admitted that he sustained no visible objective injury.

Counsel for the applicant referred in argument to sect. 106 of the Grand Jury (Ireland) Act, 1836, under which compensation is payable in certain cases to persons maimed, and to the personal representatives of persons murdered, and he contends that the Legislature, by adding in sect. 1, sub-s. 1 (*b*), of the Act of 1919 to the words "murdered" and "maimed" the words "or maliciously injured in his person," intended to widen the class of injury for which compensation was recoverable so as to include injury to health though unaccompanied by any outward objective injury. Counsel for the respondents, on the other hand, contend that the latter words must be construed ejusdem generis with the words "murdered" and "maimed," and accordingly restricted to cases in which the applicant has suffered some objective physical injury.

We agree with counsel for the applicant that the Act of 1919 widens both the class of persons entitled to recover, and also the character of the injuries in respect of which compensation is recoverable; but

we are clearly of opinion that the Act does not extend to cases of this character. "Maiming" has a well-recognized technical legal meaning. A maim is any hurt to a man's body whereby he is rendered less able in fighting—the cutting off, disabling, or weakening a hand or finger, striking out an eye or fore-tooth are properly maims; but the cutting off of an ear or nose is not properly a maim, because it does not weaken a man, but only disfigures him. (Hawkins, Pl. Cr. Abr. 124.)

There are thus many visible personal injuries which do not fall within the class of injury technically known as "maiming." Some, if not all, would fall under the word "wound," which will be found, in conjunction with the words "kill" and "maim," in the Malicious Damage Act, 1861. It is such a class of injury as is, in our opinion, intended to be covered by the added words of the 1919 Act. They form a sufficient subject-matter for the words "or maliciously injured in his person" without the necessity of applying them to ailments or illnesses such as colds or chills or temporary discomforts.

We were pressed by counsel with the argument that the applicant had suffered a wrong by reason of his unlawful arrest and assault. This is no doubt true; but it is only a very limited number of torts that come within the provisions of the Malicious Injury Code, and we do not consider that the principles underlying the assessment of damages in actions of tort (cf. *Bell* v. *Great Northern Railway Co.* (*Ireland*) (1)) or of compensation in applications under the Workmen's Compensation Act (cf. *Yates* v. *South Kirby, etc., Collieries, Ltd.* (2)) apply to the award of compensation under the Criminal Injuries (Ireland) Act, 1919, with which we are concerned in the present case. Wholly apart from the ejusdem generis argument which has been addressed to us, we consider that the words "injured in his person" in the Act of 1919 are much stronger and have a different signification from the words "personal injury" in the Workmen's Compensation Act.

This kidnapping case appears to us to be distinctly analogous in principle to the case of pure loot or theft of goods, for which in *Leyburn* v. *Armagh County Council* (3) it was held that compensation was not recoverable; but we decide it on the express language of the statute.

We accordingly dismiss this appeal; but we agree with Lord Justice Moore that, as this case is in the nature of a test case, no costs of the hearing in this Court should be awarded against the applicant.

Solicitors for the applicant: *Clark & Gordon.*
Solicitor for the County Council of Fermanagh: *Charles F. Falls.*
Solicitor for Tyrone County Council: *J. J. Rea.*

J. M'C.

(1) 26 L. R. Ir. 428. (2) [1910] 2 K. B. 538. (3) [1922] 2 I. R. 58.

K. B. Div.
(Probate.)
(I. F. S.)
Dodd J.
1923.
Feb. 9.

In the GOODS of ELIZA COTTON.

Probate—Practice—Mutual will—Codicil endorsed thereon and subsequent trust disposition—Freeholds in Scotland—Original will allowed to be sent to Scotland.

Two sisters executed a mutual will, leaving everything belonging to the first to die to the survivor, and appointing the survivor executrix. Subsequently they executed a codicil, endorsed on the original will, dealing with freeholds in Scotland, and also a further trust disposition, to take effect on the death of the survivor, revoking the codicil and dealing with the Scotch property, but expressly saving the original will.

The Court gave the survivor liberty to apply for a grant of probate of the original will, with liberty to the persons interested in the trust disposition to apply to have the original will and endorsement thereon handed over to the proper Registry Office in Scotland.

Form of order.

Motion ex parte.

Eliza Cotton and her sister Mary Smythe Cotton (who lived together at Humphrystown, Blessington, Co. Wicklow) executed a joint or mutual will, dated 12th March, 1912 (hereinafter referred to as Disposition No. 1), whereby they devised and bequeathed to the survivor of them all the real and personal estate that should belong to the first of them to die, and appointed the survivor the executor of the first to die. This will was prepared by a firm of writers in Scotland, but was executed at Humphrystown. On 12th June, 1913, Eliza Cotton and her sister jointly executed a further testamentary document (hereinafter referred to as Disposition No. 2) in the nature of a codicil to the said will, but expressed to take effect only on the death of the survivor of them, by which, having referred to Disposition No. 1 as "the foregoing mutual settlement," they and each of them, in the event of her being the survivor, devised and bequeathed certain freehold property in Glasgow, held by them as tenants in common, to the several persons named therein, with certain other provisions, and thereby reserved a power of revocation to themselves and the survivor of them, and declared that nothing therein contained should affect Disposition No. 1. This last-mentioned document was prepared by the same firm, and was endorsed on the same paper as Disposition No 1. On 30th August, 1919, they executed a further testamentary paper (hereinafter referred to as Disposition No. 3) dealing solely with the freehold property in Glasgow, in the form of a conveyance to trustees, who were also appointed special executors in relation to such parts of the trust estate as might be movable or executory estate. This last-mentioned document was expressed to become operative on the death of the survivor, and revoked Disposition No. 2, but contained an express saving of Disposition No. 1. Eliza Cotton died on the 27th December, 1922, leaving her sister, the said Mary Smythe Cotton, her sole next-of-kin and heiress-at-law. In addition to the freehold property in Glasgow, she died possessed of considerable real and personal property in Southern Ireland.

Longfield, on behalf of Mary Smythe Cotton, asked for liberty to apply for a grant of probate of Disposition No. 1, with such directions as might be necessary as to the custody and otherwise of Disposition No. 2 (endorsed thereon), and, if necessary, also of Disposition No. 3. In *The Goods of Piazzi-Smith* (1) the Court granted probate of so much as became operative on the husband's death. It was there pointed out that the will really consisted of three parts—1, the will of the husband if the wife survived him; 2, the will of the wife if the husband survived her; and 3, the will on the death of both. [He also referred to *The Goods of Miskelly* (2) and *The Goods of Astor* (3).]

His Lordship made an order, which referred to the affidavit in support of the motion and the documents therein mentioned, as follows:—

"And it appearing to the Court that neither of the said documents referred to in the said affidavit as Dispositions Nos. 2 and 3 affects the bequest of the personal estate contained in the said joint will, dated the 12th day of March, 1912, and referred to in the said affidavit as Disposition No. 1, it is ordered by the Court that, notwithstanding the codicil endorsed on the second and third pages of the first document named herein, and notwithstanding the terms of the said trust disposition and settlement dated the 30th day of August, 1919 (Disposition No. 3), the said Mary Smythe Cotton be at liberty to apply for a grant of probate of the said joint will dated the 12th day of March, 1912, as the will of the said deceased referred to in the said affidavit as Disposition No 1, as sole executrix therein named, in the events that have happened. It is further ordered that the said documents referred to as Dispositions Nos. 1 and 2 be lodged in the Principal Probate Registry of this Court, with liberty to the persons interested in the property dealt with by the said trust disposition and settlement to apply to have the said documents handed over to the proper Registry Office in Scotland."

Solicitors for the applicant: *Cathcart & Hemphill.*

T. C. T.

(1) [1898] P. 7. (2) I. R. 4 Eq. 62. (3) 1 P. D. 150.

Appeal.
(N. I.)
1922.

Nov. 20.
Dec. 13.

PLUMB, Applicant; FERMANAGH COUNTY COUNCIL, Respondents. ORR, Applicant; COUNTY COUNCILS OF FERMANAGH, CAVAN, MONAGHAN, and TYRONE, Respondents (1).

Malicious injury—Murder—Compensation—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 140; *Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *s.* 5, *sub-s.* 2—"*Neighbouring counties*"—*Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67, *s.* 1)—*No jurisdiction to apportion compensation upon any county outside Northern Ireland.*

Applicant's husband, who was a constable in the Special Constabulary, was ambushed in County Fermanagh, near Garrison, within 200 yards of the Leitrim border. He was wounded and carried off into County Leitrim, and his dead body was afterwards found on the Leitrim side of the border. The applicant applied for compensation for the murder of her husband, and asked that the amount should be apportioned between the Counties Fermanagh and Leitrim.

Held, that the Courts of Northern Ireland have no jurisdiction to make an order against any county in Southern Ireland as "a neighbouring county" within the meaning of sect. 140 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), and that the expression "neighbouring counties" must be taken to mean "neighbouring counties" in Northern Ireland.

The jurisdictions respectively set up by the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), are mutually independent and exclusive of each other within the respective areas.

Case Stated for the opinion of His Majesty's Court of Appeal in Northern Ireland by Brown J. from the Fermanagh Assizes.

The case stated set out the facts as follows:—

The applicant's husband, Edwin James Plumb, was a constable in the Royal Irish Special Constabulary. Prior to the 5th April, a large body of men concentrated on the Leitrim border close to Garrison, County of Fermanagh, and "sniped" a person in County Fermanagh.

On the night of the 5th April, 1922, a patrol of Special Constabulary, of which the said E. J. Plumb was one, was ambushed in County Fermanagh, near Garrison, within 200 yards of the Leitrim border, the ambushers firing from a house on the Fermanagh side of the border. The said E. J. Plumb was wounded and carried off into County Leitrim. His dead body was mutilated in County Leitrim. A telegram was sent from Kiltyclogher, County Leitrim, that the body was at the disposal of his friends, and the mutilated body was recovered by two clergymen a short distance on the Leitrim side of the border.

The County Court Judge was asked to apportion the amount between Counties Fermanagh and Leitrim, but he held that he had no jurisdiction to apportion any part on a county in Southern Ireland, and stated that if he had jurisdiction he would have placed three-quarters of the amount on County Leitrim.

I was asked to state a case by the Fermanagh County Council, as I was informed that a different view of the question of jurisdiction had

(1) Before Moore and Andrews L.JJ.

been taken by a County Court Judge in Southern Ireland, and I consented to do so, the Fermanagh County Council agreeing to pay the applicant's costs of the case stated in any event. I was of opinion I had no jurisdiction to place any portion of the amount awarded upon the County Leitrim, and I accordingly affirmed the decree, placing the whole amount upon the County of Fermanagh. I would have apportioned three-fourths of the amount on County Leitrim and one-fourth upon County Fermanagh if I had had jurisdiction to do so.

The question for the Court was whether or not there is now any jurisdiction under sect. 140 of the Grand Jury (Ireland) Act, 1836, to apportion any amount of the compensation awarded on the County Leitrim.

For the applicant Orr, *Babington K.C.* and *McDermott.*

For the Fermanagh County Council, *Murphy K.C.* and *McCoy.*

For Leitrim County Council, *McGonigal K.C.* and *T. J. Smyth.*

For the applicant Plumb, *Begley K.C.* and *G. Dougherty.*

For Cavan County Council, *McGonigal K.C.* and *McGuckin.*

For Monaghan County Council, *O'Donoghue.*

MOORE L.J. delivered the judgment of the Court as follows:—

PLUMB'S CASE.

In Plumb's case the facts were that Constable Plumb was murdered on the borders of Fermanagh and Leitrim, in a most brutal and callous fashion, between the hours of 7 o'clock p.m. on Wednesday, April 5th, 1922, and 12 o'clock noon on Thursday, April 6th, 1922; and the question for our determination as stated by the learned Judge is whether or not there is now any jurisdiction under section 140 of the Grand Jury (Ireland) Act, 1836, to apportion any amount of the compensation awarded on the County Leitrim.

There is no doubt that prior to the Government of Ireland Act, 1920, it was within the powers of the Judge of Assize to apportion the amount of compensation between the two counties. This appears from section 140 of the Grand Jury (Ireland) Act, 1836, which, as amended by the Local Government (Ireland) Act, 1898, reads as follows:—"Provided also that in case such burning or other malicious injury as aforesaid shall be committed on the verge or within the distance of one mile of the boundary of any two or more counties, the person or persons who shall sustain such injury may apply for compensation in the manner by the Act and rules of Court directed in either or any one of such neighbouring counties; and all proceedings shall be taken thereupon as by the Act and rules of Court provided with respect to other applications for damages for malicious injury; and in case any sum or sums of money shall be decreed by the County Court of the county where such application shall be made, or shall be finally awarded by the verdict of any jury, as and for compensation to the person or persons applying as aforesaid, the Judge at the Assizes of such county shall have power and authority to apportion the amount

Appeal. (*N. I.*) 1922.

PLUMB AND ORR *v.* FERMANAGH CO. COUNCIL.

Moore L.J.

of such compensation amongst such neighbouring counties, and shall direct the proportion of the same which shall be paid by them respectively, and shall certify the same accordingly; and such decree shall thereupon be diminished, or decree made, according to the proportion which the said Judge shall direct to be paid by such county; and the council or councils of the said other neighbouring county or counties respectively shall, and they are hereby required, on the production of the certificate of such Judge declaring the proportion to be paid by such county or counties, to provide for such proportion when the same shall exceed one hundred pounds shall be raised off the county at large, and if such proportion shall be under one hundred pounds shall be raised off the district or districts in or near to which such injury shall be alleged to be committed, and paid to the person or persons so applying, as the case may require."

It is not contended that this section has been directly altered or repealed, but the question before us is how far its scope of operation has been altered by the Act of 1920; or, to put it more definitely, whether or not Leitrim, being outside Northern Ireland, has ceased to be "a neighbouring county" for the purposes of this section as a result of the Act of 1920.

By the Act of 1920 Northern Ireland is defined as consisting of the Parliamentary Counties of Antrim, Armagh, Down, Fermanagh, Londonderry, and Tyrone, and the Parliamentary Boroughs of Belfast and Londonderry; and Southern Ireland as consisting of so much of Ireland as is not comprised within the said Parliamentary Counties and Boroughs (10 & 11 Geo. 5, c. 67, sect. 1, sub-s. 2). Fermanagh is included in Northern Ireland, and Leitrim in Southern.

On consideration of the Act it will be seen that except for certain reserved matters the two parts of the country have absolutely separate jurisdictions for all the functions of Government. There are separate Parliaments for each, elected in different ways so far as the Upper House in each is concerned; separate Governments with separate executive officers. There are also separate judiciaries, so much so that the judgments of the Court in one cannot be executed in the jurisdiction of the other until registered as a judgment within the jurisdiction under the Judgments Extension Act, just as though such jurisdiction were in England or in Scotland (10 & 11 Geo. 5, c. 67, sect. 41, sub-s. 3). No Judge in Northern Ireland can be named in a Commission for Southern Ireland, or vice versa (sect. 41, sub-s. 4). The County Court Judges who are officers in Northern Ireland must have their counties entirely within Northern Ireland, and similarly mutatis mutandis the County Court Judges in Southern Ireland (sect. 48, sub-s. 2). It is not necessary to refer to further provisions of the statute, as we are all of opinion that the jurisdictions respectively set up by the Act of 1920 are mutually independent and exclusive of each other within their respective areas.

Further, by the Adaptation Order of 27th September, 1921, in the area of Northern Ireland references to Ireland in cases such as the present must be construed as though they were in this area references to Northern Ireland, and the Grand Jury Act must be read accordingly. We do not consider that there is anything in the Act of 1922 confirming the Treaty to alter this view. We are therefore of

opinion that there is no power in either County Court Judge or Judge of Assize in Northern Ireland to make an order against any county in Southern Ireland as "a neighbouring county" within the meaning of sect. 140 of the Grand Jury Act, and that for the purposes of the present case "neighbouring counties" must be taken to mean "neighbouring counties in Northern Ireland."

The question stated by the learned Judge will be answered in the negative; and we place the amount awarded, £1,500, upon the County Fermanagh, together with costs and witnesses' expenses in each Court and the costs of this appeal.

ORR'S CASE.

In Orr's case the application on the appeal was made against Monaghan, Cavan, Tyrone, and Fermanagh. The case stated exempts Tyrone, and we hold there is no power to charge Monaghan or Cavan, as being in Southern Ireland, outside our jurisdiction. The like rule as in Plumb's case will therefore apply, and our order will affirm the charge of £200, together with costs and witnesses' expenses in each Court and the costs of this appeal, as originally decreed against the County of Fermanagh at large.

Solicitor for applicant Plumb: *James Cooper.*

Solicitors for applicant Orr: *Clarke & Gordon.*

Solicitor for respondents the Fermanagh County Council: *Sir Charles F. Falls.*

Solicitor for respondents the Leitrim County Council: *Joseph Delaney.*

Solicitor for respondent the Cavan County Council: *Francis McBreen.*

Solicitor for the respondent the Monaghan County Council: *Henry Murphy.*

J. M'C.

K. B. Div. (J. F. S.)
1922.
Dec. 4.
1923.
Feb. 28.

THE KING (Mortimer Kelly, Patrick Casey (Kid), John Murphy, Patrick Casey (Martin), and Daniel Brohan) *v.* CONOR MAGUIRE, Land Judge of the Land Court, Dáil Éireann, and KEVIN O'SHEIL, Commissioner of the Land Settlement Commission, Dáil Éireann (1).

Prohibition—Certiorari—Illegal bodies acting as Courts—Jurisdiction of Court to interfere with orders of such bodies.

On a motion on notice for a writ of prohibition directed to C. M. and K. O'S., and other, the Judges and Commissioners of the Land Court and Land Settlement Commissioners of Dáil Eireann to prohibit them from proceeding upon or otherwise enforcing certain orders or judgments of the said Land Court and Land Settlement Commission, dated 12th November, 1920, and 14th October, 1922, and for a writ of certiorari to bring up the said orders for the purpose of having the same quashed, on the ground that the said orders were ultra vires and bad on their face:

Held, that the Court cannot grant a writ of prohibition directed to persons who, without any lawful authority, purport to act as a Court: *Clifford* v. *O'Sullivan*, [1921] 2 A. C. 570, applied. And where, there being no right or duty in the tribunal to decide a matter—its assumption of authority is illegal from the beginning—it is not subject to certiorari.

Per Dodd J.: The only Courts that can be restrained by prohibition are Courts established by the Legislature when usurping a jurisdiction of a judicial character not within, or in excess of, powers conferred upon them by the Legislature.

Per Samuels J.: These tribunals were in no sense Courts; their decrees were absolutely void in law. There was no Court to prohibit, and no judgment order or record to quash.

Application to the King's Bench Division for writs of prohibition and certiorari directed to the Judges and Commissioners of the Land Court and Land Settlement Commission of Dáil Éireann.

The following statement of the facts is taken from the judgment of Molony C.J.:—

On the 4th December, 1922, an application was made to the Court on behalf of Mortimer Kelly and four other persons as prosecutors for a conditional order for a writ of prohibition directed to Conor Maguire and Kevin O'Sheil and other the Judges and Commissioners of the Land Court and Land Settlement Commission of Dáil Éireann, to prohibit them and each of them from further entertaining an application at the suit of Michael Healy and twenty-three other persons, and from further proceeding upon or otherwise enforcing certain orders or judgments of the said Land Courts and Land Settlement Commission made upon said application and dated respectively 12th November, 1920, and 14th October, 1922, and for a writ of certiorari directed to the said Conor Maguire and Kevin O'Sheil and certain other persons directing them and each of them to bring up the said orders for the purpose of having same quashed on the ground that the said orders were ultra vires and bad on their face, and were contrary to the common law and to natural justice. The Court, instead of granting a conditional order, directed notice of motion to be served on the parties interested, and the case was fully argued in the presence of counsel for the prosecutors and

(1) Before Molony C.J., and Dodd and Samuels JJ.

the applicants. It appears from the affidavit that the prosecutors are tenants from year to year of holdings forming part of the lands of Rineen, in the County of Clare. The total acreage of the five holdings is stated to be 230 acres, 2 roods, 27 perches, and the Poor Law Valuation, £242 15s.

The applicants are, or represent themselves to be, landless men, or holders of uneconomic holdings, and on the 12th November, 1920, they claimed in the Dáil Éireann Land Court to be entitled to additional land to bring their holdings up to the standard of an economic holding; and after a hearing before Mr. Conor Maguire he ordered that John Hynes and five other persons, who were alleged to be in possession of uneconomic holdings, should have allotted to them out of the lands of the prosecutors so much land as would bring the holdings in the possession of each of them to a total value of £11, and he further ordered that James Keane and ten other persons, who belonged to what is termed in the order the non-occupying agricultural class, should also be allotted, out of the lands of the prosecutors, so much land as would provide each of them with a holding to the value of £11, and in order to provide this land the entire holding of Daniel Brohan was taken away from him and the compensation fixed at £200; and out of the lands in the occupation of Mortimer Kelly, land to the value of £17 15s.; and out of the lands in the occupation of Patrick Kelly, land to the value of £75; and out of the lands of John Murphy, land to the value of £30; and out of the lands of Patrick Casey (Martin), land to the value of £5 10s. The prosecutors (other than Brohan) were, however, to get, on possession being given and certain requirements as to fences carried out, a sum calculated at seven times the annual apportioned rent of the said lands. The order further provided for the appointment of a Valuer, who should settle the boundaries of the lands to be allotted to the claimants, and apportion the present rent over the lands so allotted.

The prosecutors served notice of appeal from this order in November, 1920, and on the 6th October, 1921, the appeal came to be heard before Mr. Kevin O'Sheil, purporting to act as a Judge of the Land Settlement Commission. He made an order on the 14th October, 1922, and thereby deprived the applicants of their lands without compensation, and ordered them to be re-divided amongst the persons named in the schedule. The effect of the order appears to be that the prosecutor Daniel Brohan was deprived of his entire holding, value £26 15s., without compensation; Patrick Casey (Martin) was deprived of his holding, £13 10s., and a holding, value £11, substituted; Mortimer Kelly was deprived of his holding, value £34 10s., and a holding, value £6 10s., substituted; John Murphy was deprived of his holding, value £55 10s., and there was substituted for it a holding, including lands and buildings, value £21 15s.; Patrick Casey, senior, otherwise Patrick Casey (Kid), was deprived of his holding, value £113. and there was substituted for it a holding, including buildings, valued at £11.

Jellett K.C. and *Corbett*, for Daniel Brohan :—

The Courts which made these orders acted ultra vires in making them. The orders were not made in pursuance of any statutory or

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lawful authority, and are contrary to the common law and to natural justice. The Courts acted in excess of any jurisdiction they may have had, as there was no submission to arbitration by the prosecutors, nor was there any power in the decree appointing them to acquire lands compulsorily or without compensation: *Cox* v. *Lord Mayor of London* (1). Consent will not give jurisdiction, and the prosecutors are not estopped by their appeal: *Farquharson* v. *Morgan* (2); *R.* v. *Wodehouse* (3); *Clifford* v. *O'Sullivan* (4).

Serjeant Hanna K.C. and *J. M. FitzGerald* for the four remaining prosecutors.

Costello, for twenty-four landless men:—

The orders are bad, and cannot be enforced. The bodies making them were not Courts, and therefore neither a writ of prohibition nor a writ of certiorari can be directed to them. There is no jurisdiction to grant either writ to illegal "Courts," but only to inferior tribunals which exceed their jurisdiction.

MOLONY C.J. [having stated the facts continued]:—

It has been contended, on behalf of the prosecutors, that we can take cognizance of the Courts of Dáil Éireann and restrain their proceedings when they exceeded the jurisdiction which has been entrusted to them by the body which they professed to serve. It appears that the jurisdiction of these Courts is derived from a Decree of An Dáil, dated 17th September, 1920, and it has been contended that the order of Mr. Kevin O'Sheil is bad on its face because there is no jurisdiction given to him by the Decree of An Dáil either to take a man's property without compensation or to hear an appeal, sitting alone.

Reference has been made to Clause 6 (*b*) of the Decree, which provides that "all appeals to the Land Commission under this Decree shall be heard by at least two commissioners (one of whom shall be the Legal Commissioner) sitting together"; and to sections which provide for the appointment of independent valuers, and give powers to purchase or lease lands on terms to be arranged by the Land Commission.

Mr. Costello, for the persons to whom the land has been allotted, while not disputing the facts alleged by the prosecutors, has argued that Dáil Éireann was an unlawful body, and the Courts which acted under it were also unlawful, and that there is no jurisdiction in this Court to grant a prohibition to a Court which was illegal in its inception and wholly illegal in its operations. He further said that his clients had no present intention of acting on the orders, and submitted that if they attempted to do so the proper remedy against them would be an injunction in the Chancery Division.

Mr. Costello's argument finds confirmation in clause 2 (*b*) of the Decree of An Dáil, which provides that "judicial notice shall be taken by all Courts of Justice of the Irish Republic of the Corporate Seal of the Land Commission, and any order or instrument bearing the said

(1) L. R. 2 H. L. 239.
(2) [1894] 1 Q. B. 552.
(3) [1906] 2 K. B. 501.
(4) [1921] 2 A. C. 570.

seal shall be received as evidence without further proof"; and indeed it is not necessary to go further than the order of Mr. Conor Maguire, which states on its face that it was given "at Ennis this 12th day of November in the fifth year of the Irish Republic, 1920 A.D."

The question, then, is whether this Court can grant a Writ of Prohibition directed to persons who without any lawful authority purport to act as a Court. The answer to this will be found in the judgments in the House of Lords in the case of *Clifford and O'Sullivan* (1), where the whole subject of prohibition will be found exhaustively considered. It was argued that the tribunal there under discussion was so far a Court that it ought to be prohibited because it had all the outward manifestations of a Court, and observed all the regular judicial forms. It had, however, to be admitted in that case that the Military Court had no legal authority, just as it has to be admitted in this case that an alleged Court, which purports to act under a Decree of An Dáil, cannot be recognized by us, and is, in fact, unlawful.

Viscount Cave sums up the law with perfect clearness, if I may respectfully say so (p. 582). He says: "The writ of prohibition has been described as 'a judicial writ' issued out of a Court of superior jurisdiction, and directed to an inferior Court, for the purpose of preventing the inferior from usurping a jurisdiction with which it was not legally vested, or, in other words, to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction (see Short and Mellor, Practice of the Crown Office, 2nd edition, p. 252). This definition is supported by the statements of text-writers (Bacon's Abr., "Prohibition," vol. vi, p. 564; Comyn's Digest, "Prohibition," vol. vii, p. 139; Hale's History of the Common Law, 6th ed., p. 45), as well as by the opinion of Willes J. in *London Corporation* v. *Cox* (2), and by that of Lord Blackburn in *Mackonochie* v. *Lord Penzance* (3), and according to this definition the writ should only issue to a Court having some jurisdiction which it is attempting to exceed."

Lord Sumner, who differed from the rest of the Court on the question as to whether the appeal in question was in a criminal cause or matter, but agreed with the decision on the question of prohibition, thus sums up the law (p. 589):—"It is common ground that the Military Court in question here is a Court in name only; that is, that it is not constituted by virtue of a statute or of the common law, and that it is the creation of and is responsible to the competent military authority. . . . . It is agreed also that old as the procedure by writ of prohibition is, and few are older, there is not to be found in all the very numerous instances of the exercises of this jurisdiction any case in which prohibition has gone to a body which possesses no legal jurisdiction at all." Many abridgments and text-books of considerable authority were cited for the proposition that a writ of prohibition will issue to a "pretended" Court, but they all seemed to rest on a dictum of Holt C.J. in *Chambers* v. *Jennings*, as reported in 2 Salk. 553. Of the other two reports of this case neither contains the words which Salkeld gives. In the report in Holt, p. 597, the words are "doubted whether there was or could be any such Court"—a deliberately supercilious allusion to the Court of the Marshal, which, though then

(1) [1921] 2 A. C. 570. (2) L. R. 2 H. L. 239, 254. (3) 6 A. C. 424, 443.

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moribund and undermined in its authority because constables were no longer appointed, still continued to exist for some time afterwards. The report in 7 Mod. 125, which is a full one, assumes the Court of Honour to be an existing Court, and omits altogether any such passage as that relied on. Clearly, if ever uttered at all, it was unnecessary to the decision and has never been followed. I do not think that, in spite of these passages, it would be right to issue a writ of prohibition as to an inferior Court in a case where, as in this case, it is admitted that there is no Court properly so called, and no legal jurisdiction as distinguished from rights exercisable on the grounds of military necessity in time of war under the order of the competent military authority. Such a grant of the writ would be without precedent, and would contradict the numerous passages of authority which treat it as the means by which inferior Courts are kept from aggrandising their actual, though limited, jurisdiction."

A somewhat feeble attempt was made to distinguish the present case from *Clifford's Case* (1), on the ground that Lord Cave had stated in his judgment (p. 583): "It is unnecessary to decide whether prohibition could in any case be granted against a body improperly setting itself up as a Court with legal authority to try cases and pass judgments." The obvious answer to that argument is that the Court here in question never claimed any legal authority in the only sense that we can recognize such authority, and indeed the point is made quite clear by Lord Cave himself when he states that there is no precedent for the issue of a writ against a body which has no statutory or common law authority to try cases and pass judgments, and which claims no such authority.

I am of opinion that the present case cannot be distinguished from *Clifford and O'Sullivan's Case* (1) by which we are bound, and consequently the writ of prohibition must be refused.

It was argued also, on behalf of the prosecutors, that they were entitled to a writ of certiorari either as ancillary to the writ of prohibition or as an alternative to it. It is quite true that the writ of certiorari has been granted to bodies which cannot in strictness be termed Courts, but it has never been granted except in respect of a judicial act, which is an act done in the exercise of some right or duty to decide a particular matter. The law on this point will be found clearly stated in the judgments in the case of *The King* v. *Woodhouse* (2), and particularly the judgment of Fletcher Moulton L.J., at p. 534: "The writ of certiorari is a very ancient remedy, and is the ordinary process by which the High Court brings up for consideration the acts of bodies of inferior jurisdiction. In certain cases the writ of certiorari is given by statute, but in a large number of cases it rests on the common law. It is frequently spoken of as being applicable only to 'judicial acts,' but the cases by which this limitation is supposed to be established show that the phrase 'judicial acts' must be taken in a very wide sense, including many acts which would not ordinarily be termed 'judicial.' For instance, it is evidently not limited to bringing up acts of bodies which are ordinarily considered to be Courts." After giving instances of writs having been granted to bodies which were not in fact Courts, he proceeds: "Other

(1) [1921] 2 A.C. 570. (2) [1906] 2 K.B. 501.

instances could be given, but these suffice to show that the procedure of certiorari applies in many cases in which the body whose acts are criticized would not ordinarily be called a Court, nor would its acts be ordinarily termed 'judicial acts.' The true view of the limitation would seem to be that the term 'judicial acts' is used in contrast with purely ministerial acts. To these latter the process of certiorari does not apply, as, for instance, to the issue of a warrant to enforce a rate even though the rate is one which could itself be questioned by certiorari. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law."

In the present case, so far from there being any right or duty in the tribunal to decide the matter, their assumption of authority was illegal from the beginning, and consequently they are not subject to the writ of certiorari.

The question may be asked what action is this Court to take in the case of an illegal body purporting to exercise jurisdiction over the property of individuals, and even to deprive them without compensation of the property which they hold with the full sanction of the law. The answer is that this Court while it prohibits and quashes the orders of inferior tribunals which exceed their jurisdiction, does not take notice of bodies which act openly and avowedly in defiance of the law. This Court has never issued a writ of prohibition or certiorari to an illegal body which challenges the authority of the Government, and with which it is the duty of the Government to deal.

DODD J.:—

I have independently arrived at the same conclusion as my Lord.

Mr. Jellett for the moving parties has presented his argument in the first instance on the assumption that the Judges who made the orders challenged were appointed by a tribunal competent to appoint Judges, and he presents several grounds of challenge, and shows that the orders made were a violation of the authority conferred upon them. This in one aspect of it would be an academic discussion, if the body appointing them had no authority to appoint them. And I was inclined to pass this part of his contention by, inasmuch as if the body appointing them had no authority to appoint them, the orders, even if within the rules of the body appointing them, would not be within the province of this Court to review. But for reasons which will appear, I cannot pass it by without comment. The orders in question are open to many objections. The Court was not constituted as required. The power to acquire land did not carry with it the power to take land compulsorily and without compensation. If this had been a Constitutional Court, these orders would have been quashed for the asking.

The orders are so bad that Mr. Costello, who is a wise and wary advocate, cannot or does not defend them. In fact, he says they are so bad and so destitute of authority that we cannot touch them. With a good deal of skill he avoided saying that the authority creating these Courts is one we cannot recognise. He flings down a Gazette containing a proclamation of some years back, issuing from Dublin Castle,

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declaring the Dáil Éireann a criminal association. The legal proposition put forward in that skilful advocacy is that this Court has nothing to do with an "illegal" Court. I do not accept a proclamation from the Lord Lieutenant, or from the King himself, as binding upon me. A royal proclamation can neither make nor unmake the law: *Cherasse, Ex parte* (1). It may be that under the Crimes Act the Lord Lieutenant had a quasi-legislative power to make law. But that jurisdiction is gone, and I think it well to give emphasis to the principle that the Executive cannot make law, that is for the Legislature. In a well-ordered community the Legislative, the Executive, and the Judiciary must be kept to their own functions. It is for the Judiciary to declare and apply existing law, and to see that the tribunals created by the Legislature act within the jurisdiction conferred upon them by the Legislature.

It lies upon the applicants to show that the authority was "a Court." To succeed Mr. Jellett must show that these gentlemen exercise jurisdiction as a Court. He relies a good deal on some observations of Lord Cave and of Lord Sumner in *Clifford* v. *O'Sullivan* (2) on the words "claims to be a Court" as distinguished from "a pretended Court." These observations were apt in the case in which they were made; but neither lord attempted to lay down a definition of what is a "Court." A tribunal may be a "Court," though not so called; a tribunal may not be a "Court," though so called.

The law is stated with great accuracy by Palles C.B. in *In re Local Government Board, Ex parte Kingstown Commissioners* (3). He quotes, at p. 159, the judgment of Brett M.R.: "I think," says the Master of the Rolls, "I am entitled to say this, that my view of the power of prohibition at the present day is, that the Court should not be chary of exercising it, and that whenever the Legislature entrusts to any body of persons other than to the Superior Courts the power of imposing an obligation on individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament." And the Chief Baron gives the legal definition: "A body of persons other than the Superior Courts that have the power of imposing an obligation upon individuals." That is, power as Courts of the Realm either of ancient common law origin or by legislative enactment. Mr. Webb in that case thought he had established his proposition that a prohibition would lie when he showed that the act done was not a ministerial one and therefore judicial. The Chief Baron said this was a fallacy. It was quasi-legislative, and the Court had no jurisdiction. Mr. Baron Dowse concurred, giving an independent judgment on another matter in controversy. The case went to the Court of Appeal, which decided the matter on the second of the two grounds. The Lord Chancellor (Naish) did not deal with this matter. He said there "would be great difficulty in saying that the 'Local Government Board are a Court' in such a sense as would allow of their being prohibited." He must have meant in their proceedings as to provisional orders. In judicial proceedings they are clearly within the principle, as Brett M.R. had pointed out. Lord Justice FitzGibbon makes this clear in his

(1) 4 De G. J. & S. 655. (2) [1921] 2 A. C. 570. (3) 16 L. R. Ir. 150 (1885).

judgment: "I intimate no opinion that the Board in exercising such functions is a Court."

I extract from all the authorities that the only Courts that can be restrained by prohibition are Courts established by the Legislature who are usurping a jurisdiction of a judicial character not within or in excess of powers conferred upon them by the Legislature. The Courts here are not Courts which have power constitutionally to impose an obligation.

The procedure upon the granting of an order is an added argument. Is our officer to send a praecipe to the officer of the alleged Court in which the order is made? That would be a recognition of a "Court" which, if I am right, we are precluded from recognizing. There is no sanction for using the word in the meaning attached to it by Austin and other writers on jurisprudence.

There have been "Courts" so called acting under the authority of organizations not established by law from time to time during the past both in England and in Ireland. I have gone back to the Articuli Clevi in the time of Edward II, the first prohibition case on record, and I can find no trace of an order of prohibition or certiorari addressed to Courts not established by law. There never was an attempt that my research has enabled me to discover to restrain such Courts, or to sue out a writ of prohibition or certiorari.

I do not ground my decision on the proclamation. I base it upon the fact that the supposed Courts were not established under any legislative enactment. Their orders are without "sanction." They cannot protect any sheriff, gaoler, or other officer acting upon them.

As to the form of the order. It would in ordinary cases be enough to make an order refusing the application. But having regard to some of the matters I have alluded to, and to the fact that these orders were issued by legal gentlemen, and might be supposed to have some legal "sanction," having regard also to the dates of some of the communications, which tend to show that these "Courts" are still purporting to act, and bearing in mind that we are custodians of the peace and entitled by our inherent jurisdiction, when facts are brought to our notice incidentally in a judicial proceeding, and it becomes expedient in the interest of the public peace authoritatively to declare the law, to do so, I am of opinion that we should preface our order by declaring that the orders challenged are null and void, the Court which issued them having no authority to issue them; that this Court declines to recognize such orders as orders of "a Court" that could be reviewed on certiorari or prohibition, and therefore says "no rule" on the application. The petitioners having misconceived their remedy, we do not give them costs. We do not grant costs against them.

SAMUELS J.:—

The proceedings before the so-designated "Land Court of Dáil Éireann, and the order as "given at Ennis the 12th day of November, in the fifth year of the Irish Republic, 1920," and signed, "Conor Maguire, Land Judge," and the proceedings before "The Land Settlement Commission," and its order purporting to be a decree, made on appeal, and dated 14th October, 1922, signed "Caomigin

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O Siadail," were at those dates, and still are, absolutely void and unenforceable in law. These tribunals, whether of first instance or of appeal, were not Courts in any sense known to the law. They had no jurisdiction, either at common law or by statute, to sit, decide, or decree. Further, they purported to act as tribunals of a republic, claiming to have been established in Ireland within the Dominions of His Majesty the King. At common law, and by the statute law of the realm, those who instituted or took part in the proceedings of these tribunals were then liable to indictment. Furthermore—as pointed out by Mr. Costello in his concise and able argument when contesting the applicability of the procedure by way either of certiorari or prohibition in this case—the Dáil itself—from which these tribunals claimed to derive their jurisdiction—had been proclaimed on 11th September, 1919, under the Criminal Law and Procedure (Ireland) Act, 1887, to be a "dangerous association," and thus, apart from any other illegality inherent in the constitution and operations of these tribunals, they, under that Act, were themselves prohibited, and were unlawful assemblies; and any persons taking part in their proceedings, or attempting to carry them into effect, would be guilty of an offence, and liable to prosecution and penalties under the statute. All the proceedings and processes of these tribunals (he urged) were and are in contemplation of the law as administered in this Court so absolutely void and ineffective that it is a misconception on the part of the present prosecutors to apply to the King's Bench for a writ of prohibition or of certiorari. In my opinion this contention is right. The very granting of either writ would imply and acknowledge an original legal jurisdiction of some sort to act as a "Court" being vested in these assemblies—a jurisdiction which they had either exceeded or exercised with some irregularity, which the High Court should control or regulate by the prerogative writ of certiorari or prohibition. But these tribunals were in no sense Courts, and their decrees are absolutely void in law There is no Court to prohibit. There is no judgment order or record to quash. Prohibition or certiorari is not, in my opinion, a proper remedy for dealing in the King's Bench with what purported to be, and in law was equivalent to, a usurpation by a hostile power.

Under the Constitution, all "Courts" in the legal acceptance derive their jurisdiction either from the King, under the ancient common law, or mediately or immediately from the King in Parliament. The Ecclesiastical Courts to which prohibitions so frequently were issued were not Courts of foreign allegiance; they were from a time anterior to the Norman Conquest recognized by the Crown, they were recognized in Magna Charta, and recognized too and controlled by many statutes from ancient times, as, for instance, by the Statute Circumspecte Agatis (13 Ed. I, c. 4). The numerous writs of prohibition issued against the Courts Christian long prior to the Reformation, as well as after the time of Henry VIII, were based upon the ground of their exceeding their admittedly lawful jurisdiction in spiritual matters, and in their administration of the English Canon Law—known to jurists as the King's Ecclesiastical Law—trenching on the domain of the Courts of Common Law.

Although the ecclesiastical law derived its origin from the civil and

canon law of Rome, such part of it as was received and allowed by the laws of England was by ancient usage incorporated either by the statute or common law of the realm. It was never allowed as the law of any foreign potentate. "Albeit the Kings of England derived their ecclesiastical law from others, yet as many as were proved, approved, and allowed here by and with a general consent are aptly and rightly called the King's ecclesiastical laws of England": *Caudry's Case* (1). See also the judgment of Lord Blackburne in *Mackonochie* v. *Lord Penzance* (2).

The history of the King's Ecclesiastical Law as applied in Ireland is traced in Sir John Davies' reports, pp. 68–71, in *Le Case de Commendam*, and in the case of *Praemunire* (*Lalor's Case*), ib., 230.

Sir John Davies' statements are quoted and adopted by Tindal C.J., in delivering the opinion of the Judges in *R.* v. *Millis* (3). See also the learned preface to the work of Bullinbroke on Irish Ecclesiastical Law. Prior to Disestablishment the Ecclesiastical Courts of the Irish Church were controlled by prohibition. Since Disestablishment the position of the tribunals of the Church of Ireland is essentially different. "The Church of Ireland has ceased to be established by law; its Ecclesiastical Courts are no longer 'Courts' in the exact sense of the term. They have no coercive jurisdiction; the ecclesiastical law is no longer 'law' in a proper sense; it has ceased to be the Queen's Ecclesiastical law, and reduced to a matter of contract": (per Whiteside C.J.), *O'Keeffe* v. *Cardinal Cullen* (4).

These tribunals are, like those of the Roman Catholic, Presbyterian, and other religious communities, "Courts" in the popular acceptance of the term, but they are not "Courts" to which a writ of prohibition or certiorari would be addressed from this Court. They are not, however, on that account immune if they invade civil rights; the legality of their decisions may be otherwise questioned and determined in the High Court of Justice. The legal position of such tribunals is thus enunciated by Lord Kingsdown in *Long* v. *The Bishop of Capetown* (5):

"It may be laid down that where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, the decision of such tribunal will be binding, when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.

"In such cases the tribunals so constituted are not Courts; they derive no authority from the Crown; they have no power of their own to enforce sentences; they must apply for that purpose to the Courts established by law, and such Courts will give effect to their decision, as they give effect to the decision of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties."

See also the judgments of the King's Bench in *O'Keeffe* v. *Cullen* (4).

If such tribunals are not "Courts" within the legal acceptance of

(1) 5 Co. Rep. 1.
(2) 6 Ap. Ca. 424, 446.
(3) 10 Cl. & F. 534.
(4) I. R. 7 C. L. 424.
(5) 1 Moo. P. C. (N. S.) 411.

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the word, how possibly can the tribunal we are considering be deemed a Court? No support for the issue of a writ of prohibition in the present case can be found in the position of the Courts Christian in England or Ireland under the King's Ecclesiastical law, or the "Courts," so termed by courtesy, of the various religious communities other than the Established Church. The ancient Ecclesiastical Courts are Courts of the King. The "Courts" of the various religious communities are tribunals of lawful associations. "The Land Settlement Commission" and the "Land Court" in question in this case were tribunals of an unlawful association. From the nature of the writ of prohibition it is clear that it can issue to the Ecclesiastical Courts of the Established Church, but should not issue to the tribunals of the voluntary Churches, and still less to such a tribunal as the "Land Settlement Commission" or the "Land Court," which we are asked to correct by this procedure.

The character of the writ of prohibition is thus described in Bacon's Abridgment:—"As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a great variety of Courts, hence it hath been the care of the Crown that these Courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed; which issues out of the superior Courts of common law to restrain inferior Courts, whether such Courts be temporal, ecclesiastical, maritime, military, &c., upon a suggestion that the cognizance of the matter belongs not to such Courts, and in case they exceed their jurisdiction the officer who executes the sentence, and in some cases the Judges that give it, are in such superior Courts punishable, sometimes at the suit of the King, sometimes at the suit of the party, sometimes at the suit of both, according to the nature of the case. "The object of prohibitions in general is the preservation of the right of the King's Crown and Courts, and the ease and quiet of the subject. For it is the wisdom and policy of the law to suppose both best preserved when everything runs in its right channel, according to the original jurisdiction of every Court; for by the same reason that one Court might be allowed to encroach, another might; which could produce nothing but confusion and disorder in the administration of justice. So that prohibitions do not import that the ecclesiastical or other inferior temporal Courts are alia than the King's Courts, but signify that the cause is drawn ad aliud examen than it ought to be; and therefore it is always said in all prohibitions (be the Court ecclesiastical or temporal to which they are awarded) that the cause is drawn ad aliud examen contra coronam et dignitatem regiam." (Bacon's Abr. Tit. Prohibition, vol. vi, p. 564.)

The claim for a prohibition in the present case is, in my opinion, completely covered by the decision of the House of Lords in *Clifford* v. *O'Sullivan* (1). Viscount Cave there lays it down (p. 585) that the writ of prohibition should only issue to a Court having some jurisdiction which it is attempting to exceed. He adopts the definition of the writ of prohibition given in *Short* v. *Mellor* (Practice of the Crown Office, 2nd ed., p. 252):—"It is a judicial writ issuing out of a Court of superior jurisdiction and directed to an inferior Court for

(1) [1921] A. C. 570.

the purpose of preventing the inferior from usurping a jurisdiction with which it was not legally vested, or, in other words, to compel Courts entrusted with judicial powers to keep within the limits of their jurisdiction."

The so-called Court that we have to consider, however, never had any legal powers and was never entrusted with any jurisdiction which it might exceed. Its operations were not merely extra-legal but anti-legal.

But Serjeant Hanna and Mr. Jellett have contended that this case is distinguishable from *Clifford* v. *O'Sullivan* (1) on the ground that in that case the committee of officers did not purport to act as a Court or make any claim or pretence to be such; whereas in the present case the tribunals claim to be constituted Courts of first instance and of appeal—that the order of the appeal tribunal is not spent, but it is on the face of it intended to be carried into effect by sending a valuer to determine boundaries and apportion rents between the persons to whom the lands have been allotted, and that the present applicants are to be deprived of their holdings by virtue of this decree and the proceedings following. It is urged that the tribunal we have to deal with is a pretended "Court" which can be prohibited within the dictum of Holt C.J. in *Chambers* v. *Jennings* as reported in 2 Salk. 553. *Chambers* v. *Jennings* has been discussed in *Clifford* v. *O'Sullivan* (1) both by Viscount Cave and by Lord Sumner. The dictum of Holt C.J. does not appear in the full report of the case in 7 Mod. 125, and it cannot be relied upon as supporting the wide contention based upon it. The Court of Honour in question in *Chambers* v. *Jennings* was the ancient Court of the Marshal of England, and it is evident from the report in 7 Mod. 125 that the argument in the King's Bench was directed to the question of the then constitution of the Court. It had been originally composed of the Constable and Marshal. But Edward Stafford, Duke of Buckingham, the Lord High Constable of England, having been executed for treason and attainted in the reign of Henry VIII, A.D. 1521, no successor was ever appointed to that office. The Court of Chivalry was subsequently constituted by the Marshal and Commissioners nominated from time to time by the Crown to sit with him. The expression "pretended Court" (if used at all) was evidently directed to the point contested in the case, whether any jurisdiction existed in the Court in the absence of the Constable, and whether under such circumstances it was a perfectly constituted Court or merely a "pretended Court" and the proceedings coram non judice. The question could not have arisen whether the Court was other than a King's Court. The description of the Court of Chivalry given in Blackstone, vol. iii, pp. 104, 105, 21st ed., demonstrates that it was one of the Courts of the King. The prohibition was granted accordingly in *Chambers* v. *Jennings*.

In Stephen's Commentaries on the Laws of England, vol. iii, p. 335, it is stated: "The ancient and long disused Court of Chivalry (or Court Military) used to be held before the Lord High Constable and Earl Marshal of England. It was not a Court of record, but had a jurisdiction criminal as well as civil—relating, in the former case, to deeds of arms and war, and, in the latter, to the

(1) [1921] A. C. 570.

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redressing of injuries of honour and of encroachments in the matters of coat-armour, precedency, and other distinctions of families. As a Court of Honour, it gave satisfaction by ordering reparation in point of honour, as, for instance, to compel the defendant mendacium sibi ipsi imponere—to take the lie that he has given upon himself—or make such other submission as the laws of honour may require; but the case must have been such that no relief could be had by action in a Court of common law; and it could give no pecuniary satisfaction or damages. As to encroachments and usurpations in heraldry and coat-armour, it was its business (according to Sir Matthew Hale) to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, etc., and also rights of place and precedence, subject to any Royal Patent or Act of Parliament."

"The proceedings in the Court of Chivalry were by petition in a summary way; and the trial was not by jury, but by witnesses, or by combat, or other modes of trial, and there was an appeal to the sovereign in person." (See also Bacon's Abr., vol. vi, 585; 4 Coke's Institutes, 125, and Halsbury's Laws of England, vol. ix, title "Courts," sect. 246.)

The Court of Honour and Chivalry was not a pretended Court, but in feudal times one of recognized legality, from which an appeal lay to the King in person. It was a Court known to the English Constitution, created under and acknowledging the King's sovereignty.*

The tribunal we have to consider in this case was not so created. It acknowledged no such authority. It was not a Court within the British Constitution. It was set up as the "Court" of a republic, and in repudiation of any such allegiance as is inherent in all Courts hitherto known as Courts within the King's realms.

But it is further urged that in *Clifford* v. *O'Sullivan* (1), Viscount Cave left the question for decision in the present case open when at page 585 he said: "It is unnecessary to decide whether prohibition could in any case be granted against a body improperly setting itself up as a Court with legal authority to try cases and pass judgments; but, however that may be, there is no precedent for the issue of the writ against a body which has no statutory or common law authority

* A very learned and interesting account of the Court of the Marshal will be found in vol. ii of Hearne's Tracts, "a Collection of Curious Discourses written by eminent Antiquaries," among whom were Camden and Sir John Davies. One of these deals with "The Manner of Judicial Proceedings in the Court of the Constable and Marshall (or Court Military) touching the use and bearing of Coats of Arms observed and collected, out of the records of 'the Tower of London.'" Another is "A Defence of the jurisdiction of the Earl Marshall's Court in the vacancy of a Constable and of his disowning Prohibitions sent thither from other Courts by way of a letter to Sir John Somers, Attorney-General to his Majesty, from Robert Plott, LL.D.," evidently written in reference to *Chambers' Case*. The records cited by the author show that for more than a century and a half during the vacancy in the Office of Lord High Constable no doubt was entertained as to the jurisdiction within its own limits of the Court of Chivalry. "It is plain," he says, "that it stood fair in the eyes of the Government; the Lord Chief Justice and the other Judges and eminent common lawyers all assisting at it, and not at all doubting of the authority of the Court notwithstanding there had been no Constable in effect since the first year of Henry VIII."

(1) [1921] A. C. 570.

to do either, and which claims no such authority." If there is no precedent for prohibition in such a case, a fortiori it seems to me a precedent should not be created to grant the writ of prohibition against a so-termed "Court," which not only has no statutory or common law authority, but is itself set up repudiating any legal authority in the sense in which "legal" is used within the constitution.

As to the claim for a certiorari it must also in my opinion be rejected on the same grounds. There is no "Court" or statutory body invested with judicial or quasi-judicial functions. The whole proceedings are absolutely void from their inception, and there is no judgment, decree, or order that has or can have any legal efficacy which could be brought up to be quashed. The proceedings are not merely irregular or voidable; they are absolutely void. Certiorari will not be granted to bring up proceedings which are absolutely void: *Re Daws* (1); nor will the writ be addressed to an inferior Court where the inferior Court could not by a writ of procedendo be ordered to resume the proceedings: *Weston* v. *Sneyd* (2). A fortiori it should not be granted where the tribunal is not a Court or body possessing any common law or statutory authority whatever, judicial or quasi-judicial, and where a procedendo would involve a direction to take further steps in illegality.

It has been pressed upon the Court that the refusal of a prohibition or certiorari would leave the complainants remediless in the King's Bench. This is not so. The present application is one seeking a particular procedure. The procedure for dealing with such bodies and such acts as those in question is not by way of prohibition or certiorari. To grant either writ would not be according to the practice of the Court. The prosecutors have their ordinary legal remedies for what has already occurred, and if they apprehend a breach of the peace or injury to their persons and deprivation of their properties have further remedies open to them in the King's Bench and Chancery Divisions in the High Court of Justice; but prohibition or certiorari is not a writ issued to control tribunals or bodies other than those constituted as Courts by law and invested with judicial or semi-judicial functions by the common law or statute.

Solicitor for the prosecutor Daniel Brohan: *John B. Lynch.*
Solicitor for the four remaining prosecutors: *James Lynch.*
Solicitor for the twenty-four landless men: *J. J. Daly.*

H. H.

(1) 8 Ad. & El. 936. (2) 1 H. & N. 703.

K. B. Div. (*Crown Side*) (*I. F. S.*) 1923. Jan. 30.

JAMES UDEN, Appellant; EDWARD DUNNE, Respondent (1).

Public Health—Offences—Unsound food—Sale of fruit unfit for human food—Notice exhibited at stall that sale was on terms that unsound portion should be destroyed by purchaser, and that price was to be deemed as paid for sound portion—Conviction for offence against Public Health (Ir.) Act, 1878 (41 & 42 *Vict. c.* 52), *sects.* 132 & 133; *Dublin Corporation Act*, 1890 (53 & 54 *Vict. c. ccxlvi*), *sect.* 65, *quashed.*

The appellant, a wholesale vendor of fruit intended for the food of man, exposed for sale at his stall in the Dublin Corporation Market, a case of apples known as "Lisbon" apples, which were liable to decay, but the decay could not be detected by visual inspection or handling. A notice in the following terms was exhibited at the appellant's stall:—"All goods ex-warehouse are sold under the condition that the purchaser destroys all unsound fruit. All Fruit and Produce is sold by us, whether by auction or Private Treaty, on the condition that the price paid be regarded by the buyers as the value of the sound goods contained in any package, whether the whole of such contents be sound or only a part thereof; and as regards such of the contents as are spoiled, damaged, or otherwise defective, so as to be unfit for human consumption, such defective goods are not intended by us or purchased by the buyer for the food of man."

After the usual market, one Sarah M'Daid, a retailer of apples, purchased the case from the appellant, and the magistrate found as a fact that at the time of the sale and purchase one-third of the apples were unsound. She was aware of the contents of the notice, and on previous occasions had frequently bought fruit subject to its terms.

The magistrate convicted the appellant of an offence under sects. 132 and 133 of the Public Health (Ir.) Act, 1878 (41 & 42 Vict. c. 52), and sect. 65 of the Dublin Corporation Act, 1890 (53 & 54 Vict. cap. ccxlvi).

Held, following the decision of the majority of the Court in *The Queen* v. *Dennis* ([1894] 2 Q. B. 458), that the decision of the magistrate was wrong, and that the conviction should be quashed.

Case Stated by the Dublin Metropolitan Police Magistrate pursuant to 20 & 21 Vict. c. 43.

The summons in this case was as follows:—"You are hereby required personally to be, and appear before me, or any one or more of the Justices of the Peace in said district, presiding at the Dublin Metropolitan Police Courts, Inns Quay North Court, on the 7th day of September, 1922, at 11.30 o'clock forenoon, to answer the complaint of Edward Dunne, being a Sanitary Officer (to wit a Sanitary Sub-Officer and Inspector of Nuisances), of and on behalf of the Right Honourable the Lord Mayor, Aldermen, and Burgesses of Dublin, acting by the Town Council, being the Urban Sanitary Authority for the said city of Dublin, under the Provisions of the Public Health (Ireland) Act, 1878, that certain fruit, to wit, one-third of a case of apples, was on Saturday, the 5th day of August, 1922, exposed for sale at the wholesale market, St. Michan's Street, in the said City of Dublin, and was intended for the food of man, and was unsound, unwholesome, and unfit for the food of man. Which said fruit was purchased by one Sarah M'Daid as and for human food, and the same appearing to her to be unsound, and

(1) Before Molony C.J. and Dodd J.

unwholesome, and unfit for human food was on or about the 8th day of August, 1922, aforesaid by her delivered to the complainant for the purpose of being carried before a Justice, and that the said fruit was afterwards dealt with by a Justice, and that the said Justice, to wit, Mark. B. Cooper, Esq., on the 9th day of August, 1922, condemned the said fruit, and ordered same to be destroyed, and that you are the person to whom the said fruit did belong, or on whose premises the same was found at the time of such exposure for sale as aforesaid, whereby you have become liable to a penalty not exceeding £20, or to imprisonment for a term of not more than three months, and herein fail not at your peril. Dated this 31st day of August, 1922."

And the said parties being then present, the said summons was heard before me, and, upon such hearing, I ordered that the said defendant be convicted of said offence, and that he do pay as penalty the sum of ten shillings, within seven clear days. And whereas the said defendant hath, pursuant to the provisions of the before-mentioned statute, given me notice, and required me to state and sign a case setting forth the facts, and the grounds of my determination, as aforesaid, in order that he might take the opinion of the said High Court of Justice thereon. Now I, the said Divisional Justice, pursuant to the said notice, and the provisions of the said statute, do hereby state and sign such case as follows:—

I found the following facts: 1. The defendant is a wholesale vendor of fruit intended for the food of man. 2. On the 5th day of August, 1922, the defendant exposed for sale at his stand in the Dublin Corporation Market, in the Police District aforesaid, a case of apples, known in the trade as "Lisbon" apples. 3. Said apples are peculiarly liable to decay, which commences at the cores and extends outwards. 4. Said decay cannot be detected by visual inspection or handling, but fruit traders are aware of the special tendency to decay in said apples. 5. On said date, the average market-price of said apples was 19s. to 20s. per case. 6. After the usual market by auction on that date, one Sarah M'Daid, who is a retailer of apples, purchased from the defendant a case containing "Lisbon" apples for 17s., and said apples were intended for the food of man. 7. Before said purchase, the said Sarah M'Daid had an opportunity of visual inspection and handling. The said Sarah M'Daid bought the said apples for the purpose of her retail trade. 8. At the time of said sale and purchase, said apples were unsound, unwholesome, and unfit for the food of man. 9. The said Sarah M'Daid delivered certain of the said apples to the complainant, Edward Dunne, who is an Inspector of Nuisances and Sanitary Officer of the Corporation of Dublin, being the Urban Sanitary Authority for the City of Dublin, and said officer conveyed said apples, so delivered, before a Divisional Justice of said Police District, who on 9th August, 1922, condemned same, and ordered same to be destroyed. The said Sarah M'Daid retailed to her customers so many of said apples, bought from defendant, as were sound and fit for human consumption. She did not sell any apple that was unsound. 10. At the time of said sale and purchase, there were displayed prominently in the said Dublin Corporation Market notices, copies of which were incorporated therein, and actual prints of which, marked "A" and "B," are annexed

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hereto. The said Sarah M'Daid was aware of the contents of said notices, and on previous occasions had frequently bought fruit subject to the terms of said notices.

"NOTICE.

"All goods ex-warehouse are sold under the condition that—
"The Purchaser destroys all unsound fruit."

"NOTICE.

"All Fruit and Produce is sold by us, whether by Auction or Private Treaty, on the condition that the price paid be regarded by the buyers as the value of the sound goods contained in any package, whether the whole of such contents be sound or only a part thereof; and as regards such of the contents as are spoiled, damaged, or otherwise defective, so as to be unfit for human consumption, such defective goods are not intended by us or purchased by the buyer for the food of man."

Mr. Burke, Solicitor for complainant, submitted that an offence had been constituted through the combined effect of sects. 132 & 133 of the Public Health (Ir.) Act, 1878 (41 & 42 Vict. c. 52), and sect. 65 of the Dublin Corporation Act, 1890 (53 & 54 Vict. c. 246).

Mr. Geoghegan, instructed by *Messrs. Wm. Smyth & Son* for the defendant:—

Submitted that the transaction with Sarah M'Daid was a sale of the good apples for the purpose of retail and of the bad apples for destruction, and that the notices "A" and "B" referred to above which were the conditions of sale exempted the defendant from any criminal liability under said section.

I held and determined that in law said notices were ineffectual to exempt the defendant from criminal liability under the section cited by the complainant, and that he was guilty of the offence charged.

Geoghegan (with him *H. D. Conner K.C.*), for the appellant:—

Under sect. 132 of the Public Health (Ir.) Act, 1878, the party charged is entitled to prove that the food was not intended for the food of man. The defendant sold under the terms of the notices incorporated in the case stated. The terms of the notices show that the defendant did not intend the bad fruit for human food. *The Queen* v. *Dennis* (1) is in point. Section 65 of the Dublin Corporation Act, 1890, does not assist the respondent, it merely puts him in the same position as if he had seized the fruit before sale in the market.

P. O'C. White (with him *Timothy Sullivan K.C.*), for the respondents:—

The whole case of fruit was sold for food of man and the notices published by the appellant were ineffectual. To escape liability he should have proved that at the time he did not know and did not believe that any part of the contents of the case of apples was unfit for human food.

[Cited:—*Cork Rural District Council* v. *Hannah Walsh* (2); *Hobbs* v. *Winchester Corporation* (3).]

(1) [1894] 2 Q. B. 458. (2) [1908] 2 I. R. 234. (3) [1910] 2 K. B. 46.

MOLONY C.J. :—

In this case the complainant is an Inspector of Nuisances and Sanitary Officer of the Corporation of Dublin and the defendant is a wholesale vendor of fruit in the Dublin Corporation Market. The summons was brought under the provisions of the Public Health (Ireland) Act, 1878, and charged the defendant that certain fruit, to wit, one-third of a case of apples, was, on the 5th August, 1922, exposed by him for sale at the Wholesale Market, St. Michan's Street, in the City of Dublin, and was intended for the food of man and was unsound, unwholesome, and unfit for the food of man.

It appears that on the date in question Sarah M'Daid purchased by auction from the defendant a case containing "Lisbon" apples and the Magistrate found as a fact that at the time of the said sale and purchase said apples were unsound, unwholesome, and unfit for the food of man to the extent of one-third of the case as charged in the summons. Sarah M'Daid delivered the apples to the complainant, Dunne, who in pursuance of the Statute brought them before a Divisional Justice by whom they were condemned and ordered to be destroyed.

Under section 132 of the Public Health (Ir.) Act, 1878, the sanitary officer is authorized to inspect and examine, inter alia, any fruit "exposed or being conveyed for sale, or deposited in any place for the purpose of sale or of preparation for a sale and intended for the food of man, the proof that the same was not exposed or being conveyed or deposited for any such purpose or was not intended for the food of man resting with the party charged"; and the section further provides that if any such fruit appears to the sanitary officer to be diseased or unsound or unwholesome or unfit for the food of man he may seize and carry away the same himself or by his assistant in order to have the same dealt with by a Justice. Under section 133 power is given to the Justice to order the destruction of the thing seized, and it is declared that the person to whom the same belongs or did belong at the time of the exposure or conveyance for sale or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding £20.

It was held by the Queen's Bench in England in the case of *Vinter* v. *Hind* (1), under the corresponding section of the English Public Health Act (38 & 39 Vict. c. 55, sec. 116), that where a person exposed for sale and sold meat to a customer who took it home for food, and some days afterwards handed it over to an Inspector of Nuisances, the seller was not liable because the meat was not "so seized" and condemned as was prescribed by the sections of the Public Health Act. This difficulty, however, was got over as regards Dublin, by the Dublin Corporation Act, 1890 (53 & 54 Vict. c. ccxlvi), which provides that where any person has purchased as and for human food any fruit, etc., which appears to him to be diseased or unsound or unwholesome or unfit for human food he may deliver the same to any sanitary officer of the Corporation for the purpose of being carried before a Justice, and the Justice shall have all such powers and jurisdictions in the case as he would have had if the article or articles had been seized and carried before him by a sanitary officer under the

(1) 10 Q. B. D., p. 63.

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powers of the Public Health Act, and section 133 of that Act shall be construed and put in force accordingly.

It is admitted by the defendant that on the findings of fact by the magistrate he is liable to conviction, unless he is entitled to rely upon two notices which, according to the case, were prominently displayed in the Corporation Market. One of these notices was as follows:—"All fruit and produce is sold by us, whether by auction or private treaty, on the condition that the price paid be regarded by the buyers as the value of the sound goods contained in any package, whether the whole of such contents be sound or only a part thereof; and as regards such of the contents as are spoiled, damaged, or otherwise defective, so as to be unfit for human consumption, such defective goods are not intended by us or purchased by the buyer for the food of man." And the second notice was as follows:—"All goods, ex warehouse, are sold under the condition that the purchaser destroys all unsound fruit."

The magistrate held and determined that in law the notices were ineffectual to exempt the defendant from criminal liability under the sections cited by the complainant, and that he was guilty of the offence charged.

This finding is in itself somewhat ambiguous, but the case has proceeded upon the basis that the sale was a sale subject to the terms of the notices, and that, consequently, the purchaser at the time she purchased knew that such of the fruit as proved to be defective was not purchased by her for the food of man, and that she was bound to destroy it.

The defendant has strongly relied on the case of *The Queen* v. *Dennis* (1), which was a prosecution brought under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76) (sect. 47, sub-s. 3), under which section it was also required to be proved that the article in respect of which the prosecution was brought was purchased for the food of man. In that case the defendant, as here, was a fruit broker, and it was alleged against him that he had sold walnuts which turned out to be unsound. The defendant relied on a notice which was posted in his shop to the effect that original packages of either fruit or vegetables were sold on the express condition that the buyers sort the contents and destroy the unsound portion before being offered to the public. The case was tried by a jury at the county of London Sessions, and the jury were directed by the judge that the defendant could not contract himself out of the liability by agreeing that the buyer should sort out and destroy the bad nuts, and that they must altogether disregard the printed notice. The jury having returned a verdict of "Guilty," a case was stated for the Court for Crown Cases Reserved, and was very fully argued and discussed before eleven judges.

It was held by ten judges—Hawkins, Cave, Grantham, Charles, Vaughan Williams, Lawrance, Wright, Collins, Bruce, and Kennedy JJ., Mathew J. dissenting, that the conviction was wrong, and must be quashed, and further held by Hawkins, Grantham, Charles, Lawrance, Wright, Bruce, and Kennedy JJ., that the jury ought to have been asked whether the sale was made subject to the terms of the printed notice, and whether the walnuts were purchased for

(1) [1894] 2 Q. B. 458.

the food of man. Mathew J. dissented, and his judgment was to the effect that even assuming the notice to be embodied in the contract for sale, it did not relieve the defendant of the duty intended to be imposed on him as a seller by sub-s. 3, and that the question whether unsound walnuts were purchased for the food of man ought not to be put to the jury. Vaughan-Williams and Collins J.J. agreed with the decision of the majority of the Court that the conviction ought to be quashed, but did not give any separate judgments. Kennedy J. in giving judgment said (p. 466): "The conviction of a seller under sub-s. 3 cannot be justified, unless the buyer is shown to have purchased the article 'for the food of man.'" In order to negative this, evidence was adduced by the defendant as to the exhibition of the special printed notice to buyers as to the practice of fruit brokers. It was evidence, no doubt, to be considered by the jury only in connexion with all the other circumstances of the case. It was for the jury to consider whether the transaction, which would appear otherwise to have been a sale by sample of articles commonly used for human food, was really made subject to the terms of the notice, and what weight should be given to the alleged trade practice, and then to use their conclusions on these points with all other matters found to their satisfaction in determining whether the walnuts were or were not purchased for the "food of man." In the present case the notice was far more specific than the notice in *Dennis's Case* (1), and contained an express stipulation that damaged fruit was not purchased by the buyer "for the food of man," and consequently, once it appears that the sale was made subject to the terms of the notice, it necessarily follows that the article was not intended "for the food of man." This is put in another way in the judgment of Grantham J. (p. 469), where he says: "The contract between the broker and purchaser was a contract to destroy the bad ones, and the purchaser, as I have shown in my judgment, did not carry out his contract; if he did not, how can the broker be convicted of a crime because his purchaser broke a civil contract?"

Mathew J. in his dissenting judgment came to the conclusion, that even assuming the notice to be embodied in the contract for sale, the defendant was not relieved of the duty intended to be imposed upon him as seller, and that the enactment did not permit the seller to shift his responsibility to the buyer.

A number of cases were relied on by the complainant, but on examination they do not appear to me to touch the point in question. In *Grivell* v. *Malpas* (2) it was expressly pointed out by Lord Alverstone C.J. in his judgment that in the case of *The Queen* v. *Dennis* (1) the question which they were then considering was not necessarily before the Court; and although I have carefully read the three other cases relied on by the complainants, namely, *Cork Rural District Council* v. *Hanna* (3), *Hobbs* v. *The Winchester Corporation* (4), and *Puck's Case* (5), I am unable to see that they in any way assist the complainants' case. I am of opinion that the decision of the majority of the Court in

(1) [1894] 2 Q.B. 458.
(2) [1906] 2 K.B. 32.
(3) [1908] 2 I.R. 234.
(4) [1910] 2 K.B. 471.
(5) 76 J.P. 481.

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The Queen v. *Dennis* (1) was right, and that the decision of the Magistrate in this case, though supported by the high authority of Mathew J., is wrong, and that consequently the conviction should be quashed.

DODD J. :—

I concur in the result, and substantially for the same reasons and mainly upon the judgments in *The Queen* v. *Dennis* (1). The attempt made by Mr. White with his usual subtlety to found a distinction between this case and *The Queen* v. *Dennis* (1) on the difference between the English and the Irish Acts does not in my opinion succeed. It rather recoils. Under the English Act it is provided that a seller can escape liability by proving that he did not know and had no reason to believe that the thing sold was unfit for the food of man. In the first place the decision was not based upon that provision, and in the second place it would not avail the seller here, for the notice itself is evidence that he did know that some of the things sold were unfit; that in the course of transit they must have become tainted. Some were unsound. The ground of the decision in *Dennis's Case* (1) was that the walnuts were not in fact purchased for the food of man. Speaking for myself, I have had experience of decisions of the Court being pressed beyond their legitimate operation. We have a notable instance in *Tyler's Case* (2), where even the Court itself extended its decision beyond its legitimate limits. The case of *Boggan* v. *Motor Union Assurance Co.* (3) illustrates this principle also. I think it well, therefore, to guard my judgment. It will not do for a seller to say that merely by adopting a notice such as that in *Dennis's Case* (1) a seller can avoid liability. Such a notice could hardly, by any conceivable possibility, be of any value in a retail trade, and, though I do not seek to differentiate in law between wholesale and retail transactions, there is in practical affairs a difference in the application of the principle.

But further, even wholesale dealers must be on their guard. A trader cannot protect himself merely by publishing a notice, though the notice is an important element. It is not solely the question of a bona fide notice. It is a question of fact. Come back to the words of the Act. Were these apples, at the time and in the circumstances mentioned in the case, in fact sold for the food of man? That may be a question of degree and may depend upon the nature and quality of the thing sold, whether it can be conveyed free from taint, and in every case must be a question of commercial probity. It is, as in cases of fraud and similar cases, inexpedient to seek by judicial decision to give a category of what is or is not within a legal principle.

If a seller, relying on this decision, should seek to put upon the market goods intended for the food of man, this decision would not avail him merely because of a notice. While, on the one hand, it would be a pity that a foreign trade in fruit should be hampered by an unreasonable application of the Act, it would be equally a pity if it were to be assumed that merely by such a notice the merchant could cast upon the purchaser the burden of separating the fit from the unfit. Both can be avoided if the application of the Act is based upon the bed-rock of fact, and it is upon this I base my decision here.

Solicitors for the appellant: *Wm. Smyth & Sons.*
Solicitor for the respondents: *I. J. Rice.*

(1) [1894] 2 Q. B. 458. (2) 54 I. L. T. R. 201. (3) 56 I. L. T. R. 173.

H. H.

THE KING (SLEVIN) *v.* THE CHAIRMAN OF QUARTER SESSIONS OF THE COUNTY OF LONGFORD (1).

K. B. Div. (*I. F. S.*) 1922.

March 19, 26.

Licensing Acts—Transfer—Expired licence—Order of Quarter Sessions—Certiorari—Excise Licences Act, 1825 (6 *Geo.* 4, *c.* 81, *sect.* 11)—*Licensing* (*Ir.*) *Act*, 1902 (2 *Ed.* 7, *c.* 18).

Three adjoining houses, one licensed, one a hotel, and one a hardware shop, were burnt down. The licence was allowed to expire. Afterwards the owner rebuilt the hardware shop, and applied for and obtained from the Chairman of Quarter Sessions a transfer of the licence to the new premises. On an application for a writ of certiorari to quash the order granting the transfer: *Held*, that the writ should issue on the ground that, under the Excise Licences Act, 1825 (6 Geo. 4, c. 81, sect. 11), what is to be transferred by the Commissioners of Excise is an actual and operative licence, and there is no jurisdiction to grant such a transfer after the licence has ceased to exist.

Application on the part of John J. Slevin to remove an order of the Chairman of Quarter Sessions of the County Longford made on the 10th February, 1923, granting Laurence D. Kiernan, of Granard, a transfer of a retail licence to certain premises in Main Street, in the town of Granard, from other premises in the same town situate at the corner of Market House Street and Main Street.

It appeared that Mr. Kiernan was the owner of three houses in the town of Granard—a corner house, in which he carried on the business of publican; a house adjoining, used as a hotel; and another house, also adjoining, used as regards the ground floor as a hardware store, and the upper story used in connexion with the hotel. All these premises were attacked and destroyed by fire on the 3rd November, 1920. Mr. Kiernan rebuilt the hotel and the adjoining house, formerly used as a hardware store, but did not rebuild the corner house, in which he carried on the licensed trade.

The corner house was licensed up to October, 1921, and since then Mr. Kiernan continued to pay the licence duty, but was unable to obtain the usual certificate at Petty Sessions. He applied at Quarter Sessions for transfer of the licence from what was formerly the corner house to the new premises which he had built on the site of the old hardware store. The Chairman of Quarter Sessions granted the transfer, notwithstanding the objection of Mr. Slevin, a ratepayer, and also a licensed vintner himself. Mr. Slevin sought to set the order aside on the ground that at the time of the Sessions—10th February, 1923—there was no licence in existence capable of being transferred.

(1) Before MOLONY C.J., and DODD and SAMUELS JJ.

K. B. Div. (*I. F. S.*) 1922.

R. (Slevin) *v.* Longford Justices.

Serjeant Hanna K.C. and *Connolly,* for the applicant :—

The Court of Quarter Sessions had no power to grant the transfer of licence made, as there was no actual and operative licence in existence to be transferred. If any order had been made, it should have been to grant a new licence. The order made was therefore bad, and should be quashed (sect. 11 of 6 Geo. 4, c. 81).

F. W. Price K.C. and *Geoghegan,* for Laurence D. Kiernan :—

It was not necessary that the licence should be an existing and operative one.

Molony C.J., having stated the facts set out above, continued :—

The application was made under the provisions of the Excise Licences Act, 1825 (6 Geo. 4, c. 81), sect. 11 of which provides that "in all cases in which the houses or premises in respect of which any excise licence is or shall be granted shall be burnt down or otherwise destroyed or rendered uninhabitable by fire or any unavoidable cause or accident it shall or may be lawful for the Commissioners and Assistant Commissioners of Excise or Collector and Supervisor or other person or persons authorised to grant licences within the district or place in which such house or premises was or were situate, upon due notice thereof to him or them in that behalf given, to authorise or empower, by endorsement on such licence, or otherwise, as the Commissioners of Excise shall direct, the person or persons authorised to carry on trade or business by such licence at the house or premises so burnt down or otherwise destroyed or rendered uninhabitable, to carry on such trade or business at any other and different house or premises in the same district or place, of which due entry shall be thereupon made by such person at the time of such removal thereof."

The section further provides that if the applicant is a person by law required to be duly authorized by Justices of the Peace to keep a common inn, ale house, or victualling house, such person must produce to the collector or supervisor such authority from Justices of the Peace to keep a common inn, ale house, or victualling house in the house or premises to which the person or persons shall desire to remove in consequence of such fire or other unavoidable cause or accident as aforesaid.

It was contended on behalf of Mr. Slevin—1, that there was no licence in operation which could be transferred; 2, that on the true construction of sect. 11 the Quarter Sessions must give a certificate as for a new licence of the premises; and 3, that the Act of 1902 has impliedly repealed sect. 11.

As regards the first point, it appears that the licence did in fact expire on the 10th October, 1921; but it is contended on behalf of Mr. Kiernan that it was not necessary that the licence should be an existing and operative licence at the date of the transfer, and reliance has been placed on certain cases which arise in England under sect. 14 of the 9 Geo. 4, c. 61, a section which is in some respects analogous. It provides that where an inn is by reason of fire, tempest, or other unforeseen and unavoidable calamity rendered unfit for the reception of travellers or for the other legal purposes of an inn, and the owner shall open and keep as an inn some other fit and convenient house, the Justices may grant to him a licence to sell excisable liquors by retail to be drunk or consumed therein, but such licence is to continue in force only from the day on which it shall be granted until the 5th April or 10th October thence next ensuing.

It was held in the case of *The Queen* v. *Justices of the City of Liverpool* (1) that where an application was made under this section it was not necessary that the application should be made before the expiration of the period for which the old licence was in force, and that the Justices in special sessions had jurisdiction to grant the application after the expiration of the licence. It is, however, to be observed that no question of a transfer arises under the Act of 1828, and that what in fact was obtained was a new licence.

It seems to me that on the true construction of sect. 11 of the Act of 1825 what is to be transferred by the Commissioners of Excise is an actual and operative licence, and that there is no jurisdiction to grant such a transfer after the licence has ceased to exist: there was, consequently, no jurisdiction in the Chairman of Quarter Sessions to grant the transfer, as he did in the present case, and therefore the prosecutor is entitled to a writ of certiorari for the purpose of quashing the order.

DODD J.:—

I concur in the result arrived at by my Lord, but I desire to add a few words, as my reasons are somewhat different.

It was resolved by the Court in *Paradine* v. *Jane* (2) that "where the law creates a duty or charge, and the party is disabled to perform it, without default in him and hath no remedy over, there the law will excuse him." The Justices in Aleyn's reports were Bacon and Rolle, the judgments are of great authority, and *Paradine* v. *Jane* (2) is a leading case. It is cited with respect by Mr. Justice Willes in *Clifford* v. *Watts* (3), and is undoubted law as well as good sense.

A licence to a publican "expires" within a year. It can be "renewed," but the renewal is a "new" licence. Various conditions are required for the renewal. I am satisfied that it was "impossible" for the licensee to comply with the conditions or

(1) 11 Q. B. D. 638. (2) Aleyn, 26. (3) L. R. 5 C. P. 577.

K. B. Div. (*I. F. S.*) 1922.

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Dodd J.

any of them. Has he lost his right to "renew"? The case cited in the argument from the English authorities is to the effect that though the licence has expired, the right to renewal may survive. That is expressly recognized in the Act of 1825. By sect. 16 all excise licences shall "expire" on 10th October. The Act distinguishes between "new beginners" and others, but goes on to enact that persons who were before licensed, taking out a new licence, shall not be considered beginners unless the old licence expired two years before such new licence is taken out. This assumes that the right to renewal does not "expire" with the licence; the limit of date is here not material. If everything else were right, the limit could be extended. But no extension of time can cure the defect arising from the want of authority from the licensing authority.

The struggle here is to put the applicant in the position of "a new beginner," in which case he can be confronted with an opposition based on the number of the publichouses in the town; and to prevent him from getting any benefit from "having been before licensed" for other premises, though those premises were destroyed without any default in him, and without remedy over. I think, therefore, if the applicant were seeking a licence for the hotel, which had been previously licensed, he would be in a strong position; and that is practically conceded by counsel for the objector. He would or might also have been in a position to apply for a licence for the corner house if he had rebuilt it instead of building a new house in a new place. But he is not in that position. He is falling back upon an Act of 1825, of coaching days, when it was the public rather than the publican that was considered. By virtue of that Act, sect. 11, the publican whose house had been destroyed was given a remedy, not limited in point of time, by law, though I think limited in fact, by a reasonable intendment. He was to give the public the drink it needed, and could not wait indefinitely. It does not quite end there. The Act of 1825 was an Excise Act, and did not purport to affect, much less dispense with, the power of the licensing authority. The concluding portion of sect. 11 runs: "Where such licensed person or persons as aforesaid shall be a person or persons by law required to be duly authorised by Justices of the Peace . . . it shall not be lawful for the Commissioners or Assistant Commissioners of Excise . . . to authorise and empower such licensed person or persons as aforesaid, unless such person or persons shall besides giving such notice as hereinbefore required produce to such collector or supervisor or other person or persons authorised to grant licences as aforesaid such authority from Justices of the Peace as are by law required in that behalf to keep a common inn, ale house, or victualling house in the house or premises to which such person or persons shall desire to remove, in consequence of such fire or other unavoidable cause or accident as aforesaid."

There is not an unqualified right of removal. The matter is within the discretion of the licensing tribunal. If Mr. Price's

contention were right, the licensing authority would be bound to give him a licence for any house he chose to build anywhere within the town. The applicant here was not prevented from rebuilding the corner premises. For reasons of finance he rebuilds other premises, in connexion with which he had no vested right to a licence. As regards them he is a "new beginner." He is not within the principle of *Paradine* v. *Jane* (1), and is within the purview of the Act of 1902. To be deprived of a right and to be unable to take advantage of a statute are distinct in principle. It is difficult to apply an Act which is an Excise Act to a state of the law which has altered licensing authorities and given new rights of objection to the public, and to a state of society where the prevention of facilities for drink has become the settled policy of the country. Though it may not have been expressly repealed, it may be said to have died a natural death, and neither law nor justice requires its "resurrection."

SAMUELS J.:—

I concur. The settled policy of the Irish licensing code is that a transfer affects the licensed person only, and not the licensed premises. If the house in which it is desired to carry on a publican's business be not licensed in the then current year, the application must be for an original license: *Murphy* v. *Crean* (2), per Palles C.B.

In my opinion the general principle and policy is applicable also to an authorization under sect. 11 of 6 Geo. 4, c. 81, to carry on trade in other premises where the licensed premises have been destroyed by fire or other unavoidable cause. That Act is a Revenue Act, but is part of the licensing code, and the jurisdiction of the licensing justices is recognized and preserved in it. The Revenue authorities have no power to grant a licence to carry on trade in any other premises than those which were destroyed unless the applicant produces an authorization from the Justices of the Peace to carry on the trade in the substituted premises. The application to the Justices must, in my opinion, if the trade is to be carried on in different premises, be for an original licence; but they are bound, in my opinion, to consider the position of the applicant, not as if he were a newcomer, but as a person who had a licence vested in him who has suffered its loss from causes which were beyond his control. But the Justices have also the right and duty to take into account the suitability and position of the new premises, the rights of other persons who may be affected, and to hear the objections of such persons as are entitled to be heard upon an original application. The learned County Court Judge treated the case as one of transfer merely, and his order directed

(1) Aleyn, 26.

(2) [1915] 1 I. R., at p. 142.

K. B. Div. (*I. F. S.*) 1922.

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Samuels J.

a transfer. It is bad, in my opinion, on that ground, and certiorari should be granted. I also am of opinion that the so-called transfer in this case is bad on the further ground that the former licence was spent at the end of the year for which it was originally granted, and that the indorsement of the Revenue authorities had no effect in prolonging its existence. Sect. 11 of the statute 6 Geo. 4, c. 81, contemplates, in my opinion, an application under it being made within the current year of the licence — it is by indorsement on the then existing licence, where possible, that the authorization of the Revenue authorities is to be attested. After the 10th October, 1921, there was no licence in existence to transfer, and the order for a transfer is void. The English decisions under the Ale House Act (9 Geo. 4, c. 61)—*R.* v. *Justices of Liverpool* (1); *R.* v. *Justices of West Yorkshire* (2); and *R.* v. *Nicholson* (3)—which have been cited to us do not warrant the treatment of an authorization to trade in different premises under the statute 6 Geo. 4, c. 81, sect. 6, as if a mere transfer under the Irish licensing code were applied for.

Solicitor for the applicant: *C. J. P. Farrell.*
Solicitor for Laurence D. Kiernan: *F. J. Magan.*

H. H.

(1) 11 Q. B. D. 638.
(2) [1898] 1 Q. B. 503.
(3) [1899] 2 Q. B. 455 (C. A.).

IN THE MATTER OF THE WORKMEN'S COMPENSATION ACT, 1906, AND IN THE MATTER OF AN ARBITRATION BETWEEN MARY FOLEY, APPLICANT; J. HARDIE & CO., RESPONDENTS (1).

Appeal.
(I.F.S.)
1923.

Feb. 26, 27.
March 5.

Workmen's Compensation—Seaman—Death by accident—Claim—Prescribed time—"Within six months after the news of the death"—Workmen's Compensation Act, 1906 (6 *Ed.* 7, *c.* 58), *sect.* 7, *sub-s.* 1 (*b*); *sect.* 2, *sub-s.* 1 (*b*).

Sect. 7, sub-s. 1 (*b*), of the Workmen's Compensation Act, 1906 (6 Ed. 7, c. 58), enacts that in the case of the death of a seaman the claim for compensation shall be made "within six months after news of the death has been received by the claimant." Sect. 2, sub-s. 1, which enacts that in case of death the claim for compensation must be made "within six months from the time of death," says in proviso (*b*) that "the failure to make a claim within the period . . . specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

Held, that sect. 7 is not self-contained, but that it must be read in regard to the time for the making of the claim in connexion with sect. 2, sub-s. 1 (*b*).

A seaman died on January 3rd, 1921, from injury caused by accident arising out of and in the course of his employment. On April 11th, 1921, his widow heard of his death, but was then informed that he had died from heart disease. She did not learn until November 29th, 1921, that the cause of death was injury resulting from an accident. On February 6th, 1922, a claim for compensation was made.

Held, that the omission to make the claim within six months after "news of the death" had been received by the claimant was not a bar to the proceedings, as the delay was excusable.

Per O'Connor L.J.: The date upon which news of the death by injury has been received is the terminus a quo from which the six months are to run.

APPEAL from an order of the Recorder of Dublin dated the 2nd day of November, 1922, whereby he ordered that the respondents should pay the sum of £210 to the dependants of James Foley, late of 90 Lower Gardiner Street, Dublin, as compensation for the injury resulting to such dependants from the death of the said James Foley on January 15th, 1921, from injury caused to him on January 3rd, 1921, by accident arising out of and in the course of his employment as a workman employed by the respondents. The deceased was employed as a seaman on board the barque "Killoran" by the respondent company. Whilst he was steering the barque in the Bay of Biscay on January 3rd, 1921, during a voyage from Liverpool to Australia the wheel jumped a cog or two and struck him. He was rendered incapable of work by the injuries, and died twelve days after the accident. According to the evidence of other seamen on board, the steering gear of the barque was in bad condition.

Mary Foley, widow of the deceased, heard of his death on April 11th, 1921, when she was informed on behalf of the respondent company that he had died from heart disease. On

(1) Before MOLONY C.J., and RONAN and O'CONNOR L.JJ.

Appeal. (*I. F. S.*) 1923. FOLEY *v.* HARDIE & Co.

November 29th, 1921, when the "Killoran" had returned, she learned for the first time from the seamen that the cause of her husband's death was injury resulting from accident arising out of and in the course of his employment. On February 6th, 1922, she made a claim for compensation under the Workmen's Compensation Act, 1906.

The Recorder found on the facts that the claim was properly brought, and that the delay was justifiable and excusable. In his notes he said: "I find as a fact that the ship was sent to sea to the knowledge of the captain and officers of the ship with a defective and dangerous steering wheel; that death of the seaman resulted from an injury received in the working of and caused by the defective wheel; that the news of the cause of death given by the respondents was false, and ought to have been known to be so by the respondents. I further find that the happening of the accident was suppressed, and that the fact that the deceased died from injury received in working the defective wheel was not known by the applicants until after the return of the seamen, and the applicants were up to this time misled by the untrue statement furnished to them."

The respondent company appealed.

FitzGibbon K.C. and *Sainsbury,* for the appellants:—

Section 7 is self-contained, and it must be construed independently of section 2.

Serjeant Hanna and *J. O'Connor,* for the respondent:—

It is clear, we submit, that the two sections must be read together.

MOLONY C.J.:—

In this case it is admitted that the claimant did not make the claim for compensation within six months after news of the death had been received by her, and it is contended on behalf of the respondent company that the failure to make the claim within the time specified is an absolute bar to the proceedings. The Recorder has decided that he is entitled under sect. 2, sub-s. 1, provisos (*a*) and (*b*), of the Workmen's Compensation Act, 1906, to hold, for reasons which he has found, and which in themselves are satisfactory, that the omission to make the claim within the prescribed time is not a bar to the proceedings. On behalf of the company it is argued that sect. 7 of the Workmen's Compensation Act, 1906, is an independent code as regards seamen, and that one is not entitled to read into it the provisions of sect. 2 which affect all other persons entitled to the benefit of the Act.

In order to see whether sect. 7 dealing with seamen is in itself self-contained and can derive no assistance from any other sections in the Act, it is necessary to examine the provisions of sect. 2. Sect. 2, sub-s. 1, enacts that "proceedings for the re-

covery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured; and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident, or, in case of death, within six months from the time of death." This provision is quite reasonable in ordinary circumstances, where the claimant would know the time of death and would be able to make the claim within the prescribed time; but it was felt that there should be a dispensing power in certain cases provided for in provisos (*a*) and (*b*). Proviso (*a*) says: "The want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause"; and proviso (*b*) is in these words: "The failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

We now come to the special provision in sect. 7 extending the benefits of the Act to seamen. Sub-s. 1 of sect. 7 is as follows: "This Act shall apply to masters, seamen, and apprentices to the sea service and apprentices in the fishing service, provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner or (if there is more than one owner) the managing owner or manager resides, or has his principal place of business in the United Kingdom, subject to the following modifications." What is the meaning of the phrase, "subject to the following modifications"? Does it not mean that the provisions which have gone before with regard to notice and the making of the claim are to be applied to seamen with modifications? What is the one modification in which we are particularly concerned? Notice of the accident is the first thing dealt with in the following words: "The notice of accident and the claim for compensation may, except where the person injured is the master, be served on the master of the ship as if he were the employer; but where the accident happened and the incapacity commenced on board the ship it shall not be necessary to give any notice of the accident." That is a reasonable modification, because when an accident happens on board a ship it is scarcely necessary for a person on shore to give notice to the master of the ship.

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The next modification provides that "In the case of the death of the master, seaman, or apprentice the claim for compensation shall be made within six months after news of the death has been received by the claimant." That was a necessary modification to meet a case like the present, where a seaman was killed on the high sea and news of the death was not received by the man's widow for a long time. This modification in sect. 7 must be read in connexion with sect. 2, sub-s. 1 (*b*). In construing sect. 7 the proviso in sect. 2 cannot be disregarded. I am of opinion that there is no reason to quarrel with the decision of the Recorder, and that the appeal should be dismissed with costs.

RONAN L.J.* :—

I am of the same opinion. It is imposible to hold that sect. 7 is a complete code in itself. It is simply an application of the whole Act to seamen. There is no substantive provision in the section. It consists of modifications of certain provisions in the Act in their application to seamen. In other cases the Act provides that in the case of death the claim for compensation shall be made within six months from the time of death. In the case of seamen the period, according to sect. 7, is six months after news of the death has been received by the claimant; and nothing in that section excludes the provisos contained in sect. 2, sub-s. 1 (*a*) and (*b*).

O'CONNOR L.J. :—

I agree. The object of sect. 7 was to make the date upon which news of the death by injury was received the terminus a quo from which the six months were to run. On the facts of this case it would be very curious if we were to arrive at any other conclusion because the news first received by the widow was that the death arose from heart disease and not from accident.

Solicitors for the appellants: *Goddard & Davidson.*
Solicitors for the respondent: *William Smith & Son.*

C. L.

* This judgment has not been revised by Ronan L.J.

In re Q., An Arranging Debtor (1).

K. B. Div.
(Bank.)
(I. F. S.)
Pim J.
1923.

March 14.

Bankruptcy—Arrangement—Composition agreed to on valuation of assets—Enhanced value of assets—Review of arrangement.

Q., an arranging debtor, made a statement of his affairs which included as assets lands and premises valued by the Court valuer at £800. An offer of a composition based on these figures was made by the debtor, passed by the requisite majority of creditors, and confirmed by the Court. Later the lands and premises were sold for £1,445, thereby considerably increasing the assets. A creditor, who had opposed the offer, then applied for an order setting aside the arrangement proceedings and dismissing the petition, or, alternatively, for an order adjudicating the debtor a bankrupt.

Held, that a composition which has been passed by the requisite majority of creditors and confirmed by the Court cannot be upset on any grounds short of fraud.

This was an application by a creditor of Q., who had filed a petition as an arranging debtor for an order dismissing the petition, or, in the alternative, adjudging the petitioner a bankrupt, in the following circumstances:—

On the 21st of January, 1922, the debtor filed a petition for arrangement with his creditors. The statement of affairs showed liabilities amounting to £1,245 17s. 9d., and assets available for dividend amounting to £959 12s. 6d. He made a proposal to pay 12s. 6d. in the pound, payable in three equal instalments at four, six, and twelve months from the confirmation of the proposal by the Court, the said instalments to be secured by the promissory notes of the petitioner, and to be further secured by vesting the lands and premises of the petitioner set out in the statement of affairs in the Official Assignee as trustee for the creditors.

In the statement the lands and premises were valued at £350, but before the proposal was accepted the Court auctioneer had valued them at £800, and this later valuation was before the creditors. This proposal was accepted by the requisite majority of the creditors at the second private sitting on the 7th of April, 1922, and confirmed by the Court. The petitioner failed to pay the first instalment when it became due on the 7th of August, 1922. From the evidence the Court was satisfied that he had not the necessary money, and that he was unable to borrow. On the 8th of August an application was made to the Court for

(1) Before Pim J.

K. B. Div. (*Bank.*) (*I. F. S.*) *Pim J.* 1923.

In re Q.

liberty to fix a special sitting under the 351st section, on the ground that a difficulty had arisen in the execution of the resolution. Leave was given, and the statutory notice was served on the creditors, containing an amended offer of 8s. in the pound. On the 26th of August, 1922, the amended offer was accepted by the requisite majority of creditors, and the sitting passed. The whole of the 8s. was subsequently paid in accordance with the terms of the offer. The debtor's lands were put up for sale at the end of 1922, and realized £1,445. An order was made by the Court confirming said sale on the 3rd November, 1922. This left the balance sheet of the debtor's estate as follows :—

Assets.	£	s.	d.	Liabilities.	£	s.	d.
1. Assets other than the lands sold, as shown in the Statement of Affairs,	684	3	4	1. Paid under the arrangement,	504	13	8
2. Proceeds of the sale of the lands,	1,445	0	0	2. Paid to Dr.'s mother,	100	0	0
				3. Paid to Dr.'s wife,	50	0	0
				4. Paid to auctioneer,	26	0	0
				5. Estimated costs,	325	0	0
				6. Estimated balance payable to Dr.,	1,123	9	8
	£2,129	3	4		£2,129	3	4

That is to say, that the debtor, after paying 8s. in the pound and the costs, will be able to put in his pocket about 16s. in the pound, out of which 12s. in the pound is due to his creditors.

Messrs. Todd, Burns & Co., Ltd., of 47 Mary Street, in the City of Dublin, who were creditors of the arranging debtor for £169 6s. 7d., and who opposed the amended offer, now apply for an order setting aside the proceedings in the matter and dismissing the petition, or, in the alternative, for an order turning the matter into bankruptcy.

Wilson K.C., for Messrs. Todd, Burns & Co., Ltd. :—

The offer made by the debtor was not made bona fide, having regard to his assets, and the Court has power under sect. 353 of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), to adjudge the debtor a bankrupt.

Lardner K.C., for the debtor :—

The composition was based on a valuation of the assets by the Court valuer, and was quite in order. The Court cannot now review the composition formally confirmed.

PIM J., having stated the facts as set out above, proceeded :—

As to the honesty of this transaction there can be only one opinion; but with that I am not directly concerned. An offer of composition which has been passed by the requisite majority of creditors and confirmed by the Court cannot be upset on any grounds short of fraud, no matter how unjust it may appear to have been in the light of subsequent events. Mr. Wilson, who appeared for Messrs. Todd, Burns & Co., Ltd., fully recognised this, and his argument was wholly based on the words of the 353rd section of the Irish Bankrupt Act of 1857. That section gives power to the Court, at any time after the filing of the petition for arrangement, to adjudge such petitioner a bankrupt if the Court is satisfied, amongst other things, that the petitioner was not desirous of making a bona fide arrangement with all his creditors. Mr. Wilson contended that in making the amended proposal of August, 1922, the arranging debtor could not have been desirous of making a bona fide arrangement. Is that so?

Now, so far as the first arrangement was concerned, I am clear no one can find any fault with it. True it is that the lands were in the statement of affairs valued much beneath their proper value, but before the creditors accepted the proposal they were in possession of the value put on them by the Court auctioneer. They might have pressed for a larger composition. They did not do so. They evidently considered the proposal bona fide, as indeed I have no doubt it was. There is no doubt that, before and at the time of the second proposal, the country around Portumna was in a very disturbed condition, and that business in that town had almost ceased. It is quite clear to me, as I said before, that the petitioner could not pay the first instalment himself, and could not borrow the money. Applications were made to the bank in Portumna and failed, and then an application was made to Mr. John Taylor, the auctioneer. He has made an affidavit in which he says that he hesitated before acceding to the petitioner's request, and only agreed to advance the money on condition that the petitioner's liabilities to his creditors were reduced to about £500. That, of course, meant a new proposal, and accordingly the application for a special sitting was made, and the amended proposal of 8s. in the pound was carried. At the time no one imagined that the lands would fetch £1,445 or anything like it. At most it was hoped that they would bring in £800. That certainly left a considerable margin over for the arranging debtor, but the creditors knew all about it. Prices given for land in Ireland have at all times been somewhat unaccountable, and never more so than to-day. Why this property sold so well it is difficult to understand. Possibly the action of Lord Lascelles, the ground landlord, in offering to sell the fee-simple at a very reasonable figure had something to say to it. In any case I am satisfied that no one thought of the land realizing so much. Lord Lascelles had not

K. B. Div. (Bank.) (I. F. S.) Pim J. 1923. In re Q.

spoken when the offer of 8s. in the pound was made. The condition of the county and of business was very bad. Money could not be raised to pay the first proposal. It is not alleged that any false statement was made to the creditors or any statement meant to deceive, or that in fact did deceive them. They evidently thought their chances of being paid doubtful, and they took what they could get. In such circumstances I am unable to hold that the proposal was made mala fide, and it is evident that at least a majority of the creditors, if not all, did not think so.

In the result, and purely as a matter of law, I hold that the application fails, and must be dismissed. I must, however, add that if the debtor is an honest man he will pay to his creditors at least the difference between 12s. 6d. in the pound, the amount of the first offer, and 8s. in the pound, the amount they have received. Events have treated him well. It is his mere duty to treat those whose money he holds in a like manner.

Solicitors for Messrs. Todd, Burns & Co., Ltd.: *J. L. Scallan & Co.*

Solicitor for the arranging debtor: *H. F. Chidley.*

H. H.

REX *v.* JAMES ERNEST M'QUILLAN (1).

Appeal.
(N. I.)
1923.
Jan. 30.

Criminal Law—Robbery committed outside Northern Ireland—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *sect.* 23, *sub-s.* 1; *sect.* 39, *sub-s.* 1—*Accused apprehended and in custody in Northern Ireland—Indictment and trial in Northern Ireland—Conviction—Validity.*

The accused was charged with armed robbery under the Larceny Act, 1916, sect. 23, sub-s. 1, committed on the 19th October, 1922, in the County of Leitrim. He was apprehended in the County of Tyrone, and in custody in the County of Fermanagh on 29th November, 1922, and was indicted, tried, and convicted at Belfast on 5th day of January, 1923, at the Winter Assizes for the Winter Assize County of Northern Ireland before Moore L.J., who stated a case under the Crown Cases Act, 1848 (36 & 37 Vict. c. 66), for the opinion of the Court of Appeal for Northern Ireland.

Held, that there was jurisdiction to try the accused at Assizes in Northern Ireland for the offence of which he had been found guilty.

CASE STATED pursuant to the statute in that behalf for the determination of the Court of Appeal, Northern Ireland, by the Right Hon. Lord Justice Moore at the adjourned Winter Assizes for Northern Ireland, held in January, 1923.

The case stated set out:—

At an adjourned Winter Assizes held at Belfast Court-house, in the County of Antrim, for the Winter Assize County of Northern Ireland, on the 5th day of January, 1923, James Ernest M'Quillan was tried before me as Acting Judge of Assize on an indictment charging an offence within the provisions of the Larceny Act, 1916, committed in County Leitrim, and was found guilty.

I refer to the said indictment which is incorporated in this case. It was proved before me that the offence was committed on the 19th day of October, 1922, in the townland of Gaublaun, in the County of Leitrim.

On the 20th November, 1922, the accused was detained by the police at Cookstown, County Tyrone, and was there arrested by Sergeant O'Kane, of the Fermanagh force, and brought by him under such arrest to Enniskillen, in the County of Fermanagh, where he remained in custody until the 29th day of November, 1922, when he was returned for trial to the above Assizes.

I refer to order of the Justice. At the trial before me Mr. W. F. M'Coy, prisoner's counsel, moved to quash the indictment as showing on its face a charge which he contended I had no jurisdiction to try. I thought it better to take the evidence de bene esse, and saved the point for him. After verdict he also moved in arrest of judgment on similar grounds.

Thereupon I adjourned the case until February 1st, 1923, and agreed to state the present case for the opinion of the Court of Crown Cases Reserved in Northern Ireland, that the matter might be argued.

(1) Before SIR DENIS HENRY, Bart., C.J., ANDREWS L.J., and WILSON J.

Appeal. (*N. I.*) 1923.

REX *v.* M'QUILLAN.

The question for the Court is whether a person charged with an offence under the Larceny Act, 1916, committed in the County Leitrim (outside Northern Ireland) and subsequently arrested and in custody in Northern Ireland can be tried at Assizes in Northern Ireland.

INDICTMENT.

"COUNTY OF FERMANAGH. TO WIT.—The Jurors of our Lord the King upon their Oath present that Henry George Brown and James Ernest M'Quillan on the Nineteenth day of October in the year of our Lord Nineteen hundred and twenty-two at Gaublaun in the County of Leitrim being then armed with a certain offensive weapon and instrument to wit, Revolvers, in and upon one Francis M'Gowan did make an assault and him the said Francis M'Gowan in bodily fear and danger of his life then feloniously did put and a sum of money to wit the sum of Seventy pounds of the moneys of the said Francis M'Gowan from the person and against the will of the said Francis M'Gowan then feloniously and violently did steal take and carry away and the Jurors aforesaid upon their Oath aforesaid do say that the said Henry George Brown on the eighth day of November in the year of our Lord aforesaid was apprehended and in custody in the County of Fermanagh and the said James Ernest M'Quillan on the twenty-ninth day of November was in custody in the said County of Fermanagh for the aforesaid felony by them committed against the form of the Statute in such case made and provided and against the Peace of our Lord the King his crown and dignity."

Murphy K.C. and *M'Coy*, for the prisoner.

The jurisdiction of the Courts of Northern Ireland is limited to the territory of Northern Ireland.

[ANDREWS L.J.: That is, we cannot go into County Leitrim to try a man there, but once we get a man within our own area we can try him.]

Murphy K.C.: In *Plumb's Case* (1) you had Co. Leitrim before you; it was a litigant.

[ANDREWS L.J.: They came in, and they came in with notices served outside the jurisdiction, without any power having been exercised to serve them.]

Murphy K.C.: The Winter Assize county is all one county. If there was an offence, it was committed, not in Northern Ireland, but in the Free State. An offence committed in England could not, under sect. 39, sub-s. 1, of the Larceny Act, 1916, be tried in Ireland.

[WILSON J.: Do the Acts passed prior to the passing of the Free State Act not still apply in the Free State?]

Murphy K.C.: I would not like to admit that.

[SIR DENIS HENRY C.J.: Then you have no law at all in the twenty-six counties.]

(1) Ante, p. 54.

Murphy K.C.: The Court will have to determine what law does apply in the Free State at the time the offence alleged was committed. That is the extreme awkwardness of the jurisdiction which is sought to be claimed by the Crown in this case. In every case of this kind an argument occurs whether or not the Imperial statute applying in the Northern area applies in the Free State. I cannot say what statute applies in the Free State.

[SIR DENIS HENRY C.J.: If the man was indicted in the Free State, would the statute not apply there?]

Murphy K.C.: I cannot say. On the reading of the Free State Act and the legislation since enacted by the Free State, the Government of the Free State repudiate deriving any authority from the King, and Ireland can no longer be said to be part of the United Kingdom. It occupies the same status as one of the overseas dominions.

[ANDREWS L.J.: If your arguments are correct, then the Ulster area is recognized as no longer a part of Ireland.]

Murphy K.C.: I cannot say what the view of the constitutional authorities may be, but I do say that Northern Ireland is legally separated from the Free State. If the arguments of the Crown are correct, it followed that a man might be convicted in the six counties for an offence committed in any other part of the world, or at least any other part of the British possessions.

[ANDREWS L.J.: So far I think you are entitled to say that the offence here referred to was committed within the twenty-six counties.]

Murphy K.C.: The law applicable to particular offences in the Free State may be entirely different from the law applicable to them in Northern Ireland, and hence the inconsistency of trying Free State subjects by the Courts of Northern Ireland. All crime is local: *M'Leod* v. *Attorney-General for New South Wales* (1). If the arguments of the Crown are correct, the accused could have been indicted even if the crime had been committed in America. Here everything happened in the Free State, outside the jurisdiction of the Court. Again, robbery, and robbery alone, is the sole offence charged. It required a special statute, the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), to enable offences committed in one colony to be tried in another. A strong part of our case is based on the distinction between the express wording of the Larceny Act, 1896 (59 & 60 Vict. c. 52), sect. 1, and the very clear wording of the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), sect. 39. The words "county or place" in sect. 39 of the Larceny Act, 1916, must be read distributively. There is a distinction in esse between "county and place" in Free State and "county and place" in Northern Ireland: and "county" must be referable to some larger unit. There has been a total separation of jurisdiction as between the two divisions of Ireland. Sect. 39 of the Larceny Act of 1916 should be confined in its operation, and has then a perfectly

(1) [1891] A. C. 455.

Appeal. (*N. I.*) 1923.

REX v. M'QUILLAN.

intelligible meaning. After the establishment of the Free State the Larceny Act, 1916, became two separate and identical Acts, one relating to Northern Ireland and the other to Southern Ireland. Unless the Court is prepared to hold that sect. 39 of the Larceny Act, 1916, gives jurisdiction to try offences committed outside the United Kingdom, the conviction must be quashed.

Williamson K.C. and *Maxwell K.C.* (with them *J. C. Davison*), for the Crown :—

Under the Larceny Act, 1916, sect. 39, sub-s. 1, a person charged with any offence against the Act may be proceeded against, indicted, tried, and punished in any county or place in which he was apprehended or is in custody as if the offence had been committed in that county or place. The same law applied with regard to the crime of murder. The person apprehended was to be tried as if he had committed the offence in the county or place in Ireland or England, or any other part of the United Kingdom—as if he had committed the crime there (24 & 25 Vict. c. 100, sect. 9). The Irish Free State Constitution Act (13 Geo. 5, c. 1) recognizes that the Free State is a part of and within the United Kingdom (sect. 2, sub-s. 1 (*b*)). The Larceny Act, 1916, was in force in County Leitrim at the time of the commission of the offence, and the powers given by sect. 39, sub-s. 1, are not confined to the territorial limits of the United Kingdom. The accused was tried at Northern Ireland Winter Assizes, which included both the counties of Tyrone and Fermanagh. The Act of 1916 was in force throughout Ireland at the time the offence was committed, and the Irish Free State had not then come into existence. Both Northern and Southern Ireland were recognized as within the Free State until Northern Ireland voted itself out. The Larceny Act of 1916 was the law in both the units, and anyone committing an offence against it could be tried where he was taken into custody. The Larceny Act, 1916, applies to any offence committed in the United Kingdom, save Scotland, to which this legislation does not extend.

Murphy K.C. (in reply) : The introductory words of the Act to provide for the constitution of the Irish Free State declared that the authority of the Free State Legislature was derived from God. After that, could it be contended that the Free State remained a part of the United Kingdom? No more remarkable statement than that had appeared in any Act of Parliament.

[WILSON J. : This authority to set up the Free State had been derived from the King and Parliament of the United Kingdom.]

Murphy K.C. : That was in the same way as other British dominions had been established. If the words of the section are so general, a man can be tried by our Courts for an offence committed anywhere in the world. I submit that sect. 39 of the Larceny Act, 1916, must be confined to actual subjects of the King resident in Northern Ireland and charged with offences

committed there. In essence crime is still local, and the argument contra gives an unnaturally wide meaning to the section.

Appeal.
(N. I.)
1923.

REX
v.
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SIR DENIS HENRY C.J. delivered the judgment of the Court as follows:—

We are all of opinion that there was jurisdiction to try the accused at Assizes in Northern Ireland. It is admitted that prior to the legislation establishing the Irish Free State the prisoner could have been tried under sect. 39 of the Larceny Act, 1916. The old rule of the common law was that the offence of larceny was considered as having been committed wherever the offender was taken with the goods (1 Hale 507, Russell on Crimes, 6th ed., vol. ii, p. 283), or, in other words, "the felony travels." So far as robbery was concerned, a distinction was drawn; but in any case sect. 39 of the Larceny Act of 1916 is wide enough to cover the present case, especially when we consider that it covers the case of a person charged with any offence against this Act (sub-s. 1). We have not been referred to any section in any Act of Parliament which provides that the Larceny Act of 1916 shall no longer be in force. It was suggested that this legislation had been repealed, and that no crime had been committed under the Larceny Act of 1916 in the Irish Free State. But what change has been made? It appears to me that we have to consider in this case the dates, which are all important. The offence was committed on 19th October, 1922. All the acts referred to on the part of the prisoner had been committed prior to 6th December, 1922, and before the legislation which severed the jurisdictions of Northern and Southern Ireland. In deciding this case we do not want to go one inch outside the facts that come before us. The question we have to decide is as set out. In our view the Act of 1916 was in force up to and at the time the offence alleged was committed. We are satisfied that the prisoner was in custody in Co. Fermanagh. The offence charged was found against him by a jury formally constituted, and we decide that it is within the jurisdiction of the Courts of Northern Ireland. We remit the case to Lord Justice Moore, before whom it came to be dealt with according to law.

ANDREWS L.J.:—

I agree, but I would like to add that our decision in this case must not be taken as having any general application, or as applying to any offence against the Larceny Act of 1916 committed subsequent to the enactment of the Irish Free State Constitution Act in December, 1922.

WILSON J.: I concur with the Lord Chief Justice.

Solicitor for the prisoner: *James Cooper.*
Solicitor for the Crown: *H. H. Mussen,* Assistant Chief Crown Solicitor for Northern Ireland.

J. M'C.

K. B. Div.
(N. I.)
1922.

June 22.
July 19.

THOMPSON B. ADAMS, Appellant; COLUMB McGILL. Respondent (1).

Licence—Mechanically propelled vehicle—Failure to pay licence duty—Authority to prosecute—Finance Act, 1920, *s.* 13 (10 & 11 *Geo.* 5, *c.* 18); *Roads Act*, 1920 (10 & 11 *Geo.* 5, *c.* 72), *ss.* 1 *and* 13; *Roads Vehicles (Registration and Licensing) Order*, 1921; *Excise Management Act*, 1827 (7 & 8 *Geo.* 4, *c.* 53), *ss.* 65, 73; (4 & 5 *Will.* 4, *c.* 51), *s.* 19; *Petty Sessions Act*, 1851 (14 & 15 *Vict. c.* 93), *s.* 42.

The respondent's motor-car, which was ordinarily kept and garaged in the City of Londonderry, was, on 23rd February, 1922, used in Dungiven, the licence duty in respect of the year 1922 not having been paid. A., the appellant, was an officer duly authorized by the Londonderry County Council to issue licences pursuant to the provisions of the Road Vehicles (Registration and Licensing) Order, 1921.

Held, that A. had the powers of an officer of Customs and Excise to prosecute in the County of Londonderry for disobedience of the said order, and that no authority from the Corporation of the City of Londonderry was necessary.

Case Stated for the opinion of the Court at the instance of appellant, pursuant to the Summary Jurisdiction (Ireland) Act, 1857 (20 & 21 Vict. c. 43).

At the Dungiven Petty Sessions, held on the 16th day of March, 1922, the complainant, who is the officer authorized by the County Council of the County of Londonderry to issue licences pursuant to the provisions of the Roads Vehicles (Registration and Licensing) Order, 1921, charged the defendant, who is a motor-car proprietor, that the defendant did on the 23rd day of February, 1922, use a mechanically propelled vehicle in respect of which the licence under the Finance Act of 1920 was not in force.

The facts as proved or admitted were as follows:—

1. That the defendant's motor-car, I.H. 401, was being used in the Main Street of Dungiven, within the County of Londonderry, on the 23rd day of February, 1922.

2. That the licence duty in respect of the year 1922 had not been paid on the date that the car was found in use, viz., on the 23rd day of February, 1922.

3. That the defendant is ordinarily resident within the County Borough of Londonderry, and that the said vehicle is ordinarily garaged within the County Borough of Londonderry.

4. The licence duty for the year ending 31st December, 1921, was paid in respect of the said car.

5. That the licensing authority for vehicles ordinarily kept and garaged in the County Borough of Londonderry is the Londonderry Corporation.

6. That a statement in writing, a copy of which is hereto attached, was exhibited by the complainant before Mr. R. Sparrow, a Resident Magistrate for the County of Londonderry, on the 8th day of March, 1922, and that on the 13th day of March, 1922, a summons, a copy of which is attached hereto, was served upon the defendant.

(1) Before Sir Denis Henry, Bart., C.J., and Wilson J.

It was contended on behalf of the defendant:—

1. That under the Roads Vehicles (Registration and Licensing) Order of 1921, the defendant being ordinarily resident within the County Borough of Londonderry, and the vehicle being ordinarily garaged within the said County Borough of Londonderry, that proceedings could not be instituted without the direction and authority of the Londonderry Corporation, who are the licensing authority for vehicles ordinarily garaged within County Borough of Londonderry.

2. That under the provisions of the Excise Management Act of 1827 (7 & 8 Geo. 4, c. 53), sect. 65, the proceedings should be commenced by an information in writing, and that the statement in writing exhibited to Mr. Sparrow, R.M., on the 8th day of March, 1922, a copy (1) of which is attached hereto, was not in compliance with that section of this said Act.

3. That under the provisions of the Excise Management Act of 1834 (4 & 5 Wm. 4, c. 51), sect. 19, it was required that a notice in writing of the information having been exhibited, should be given to the defendant within one week after the exhibiting thereof.

4. That the summons should have been served ten days before the hearing.

It was contended on behalf of the complainant:—

1. That the complainant being the duly authorized officer of the County Council of the County of Londonderry under the provisions of the Roads Vehicles (Registration and Licensing) Order, 1921, could proceed against the defendant if found using a mechanically propelled vehicle on a public road within the County of Londonderry without having a licence in force for the vehicle so used.

2. That the writing, a copy of which is attached hereto, exhibited before Mr. Sparrow, R.M., on the 8th March, 1922, was an information in compliance with the Excise Management Act of 1827.

3. That the summons served on the defendant on the 13th day of March, 1922, was a copy of the paper writing (1) exhibited before the said Mr. Sparrow, and was a compliance with the Excise Management Act of 1834.

4. That as this was a claim for treble the value of the duty, the summons was served in due time before the hearing.

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(1) 10TH & 11TH GEORGE THE FIFTH, Chap. 72.

PETTY SESSIONS DISTRICT OF COUNTY OF LONDONDERRY.

ADAMS, COUNCIL OFFICES, COURT HOUSE, LONDONDERRY, SECRETARY OF THE LONDONDERRY COUNTY COUNCIL, COMPLAINANT, AND COLUMB McGILL, OF 36 WILLIAM STREET, LONDONDERRY, DEFENDANT.

Whereas a complaint has been made to me that you, the defendant, on the 23rd day of February, 1922, at Dungiven, within the County of Londonderry, used a mechanically propelled vehicle in respect of which a licence under the Finance Act, 1920, was not in force contrary to the statute in such case made and provided, I authorize a summons to be issued on the above complaint. R. Sparrow, R.M. 8/3/'22.

K. B. Div. (*N. I.*) 1922.

ADAMS *v.* MCGILL.

We were of opinion that under the provisions of the Roads Vehicles (Registration and Licensing) Order of 1921 the proceedings herein could not be instituted without the authority of the registration authority in whose area the vehicle is ordinarily kept and garaged. We accordingly dismissed the summons. The opinion of the Court is sought as to whether we were right in law.

Babington K.C. and *Lowry,* for the appellants :—

The user of a vehicle in the circumstances set out in case stated could be prosecuted no matter where the offence was committed. The proper venue is the Court within the jurisdiction of which the offence is committed under the Excise Management Act, 1827 (7 & 8 Geo. 4, c. 53), sect. 65. Sect. 65 of the Excise Management Act provides that such proceedings must be commenced by information in writing, and the document attached to the case is an information within the meaning of this section. In any case, sect. 73 of the Excise Management Act, 1827, declares that defects in form are not to be regarded, and the procedure has been altered by the Petty Sessions Act, 1851 (14 & 15 Vict. c. 93). By sect. 42 of that Act Petty Sessions procedure does not apply to Excise cases, but the procedure is to be followed as nearly as possible; and sects. 36 and 37, together with sect. 42, go to show that the form of information used was adequate.

M'Afee K.C. and *M'Guckin,* for respondents :—

The only persons who could prosecute for failure to take out a licence or pay licence duty on a motor-car were the County Council or Corporation of the county or borough within which the car was registered. The document attached to the case is not an information within the meaning of sect. 65 of the Excise Management Act, 1827 (7 & 8 Geo. 4, c. 53).

SIR DENIS HENRY C.J. delivered the judgment of the Court as follows :—

The matter comes before us on a case stated by the Justices of Dungiven Petty Sessions. The proceedings originated in a complaint by Mr. Adams, who is the officer authorized by the Londonderry County Council to issue licences pursuant to the provisions of the Road Vehicles (Registration and Licensing) Order of 1921, against the defendant for using in Londonderry County, on the 23rd day of February, 1922, a vehicle in respect of which a licence was not in force. The Justices have found as a fact that the defendant's car was ordinarily kept and garaged in the City of Londonderry, and the majority of the Magistrates were of opinion that the prosecution could not be instituted without the authority of the Corporation of the city.

The new duties in respect of motor-cars were created by sect. 13 of the Finance Act, 1920 (10 & 11 Geo. 5, c. 18), and the recovery of penalties is provided for by the Roads Act, 1920

(10 & 11 Geo. 5, c. 72), sects. 1 and 13, sub-s. 1. Sect. 1 of this Act is as follows:—

1 (1) The duties on licences for mechanically propelled vehicles (in this Act referred to as "vehicles"), imposed by section 13 of the Finance Act, 1920, as amended by this Act, and the excise duties on licences for carriages imposed by section 4 of the Customs and Inland Revenue Act, 1888, shall, as from the first day of January, 1921, be levied by county councils in accordance with provisions to be made for the purpose by Order in Council.

(2) Subject to the provisions of this Act, and of any Order in Council made under this section, every county council and their officers shall, as from the said first day of January, 1921, have within their county for the purpose of levying the duties aforesaid (in this Act referred to as "the said duties"), the same powers, duties, and liabilities as the Commissioners of Customs and Excise and their officers have with respect to duties of excise, and to the issue and cancellation of licences on which duties of excise are imposed, and other matters under the Acts relating to duties of excise and excise licences, and all enactments relating to those duties and to punishments and penalties in connexion therewith, shall apply accordingly.

Sect. 13, sub-s. 1, of this Act provides that:—

If any person uses any vehicle for which a licence under the Finance Act, 1920, as amended by this Act, is not in force, or being the holder of a general licence or general licences issued under this Act, uses at any one time a greater number of vehicles than he is authorized to use by virtue of that licence or those licences, he shall be liable to an excise penalty of £20, or an excise penalty equal to three times the amount of the duty payable in respect of the vehicle or vehicles, whichever is the greater.

The plaintiff, as a properly authorized officer, had all the powers of an officer of Customs and Excise, and, amongst others, those conferred by sect. 65 of the Excise Management Act, 1827 (7 & 8 Geo. 4, c. 53).

The main question considered by the Justices was as to the right of Mr. Adams to prosecute. The motor-car was used in the County of Londonderry, and sect. 65 of the Excise Management Act, 1827, provides:—

That for the recovery of any penalty imposed by this Act, or any other Act or Acts of Parliament relating to the Revenue of Excise, and incurred for or by reason of any offence committed against this Act, or the said other Acts or any of them . . ., and where the offence shall have been committed, or the person or persons committing the same shall be found . . ., the information thereupon may be exhibited before any one or more of His Majesty's Justices of the Peace for the county, shire, division, city, town, or place wherein the offence shall have been committed, or the person or persons committing the same shall be found. . . .

A number of objections based on alleged non-compliance with certain sections of the Excise Acts were made, but on these no opinion has been expressed by the Magistrates; and Mr. Babington, for the prosecution, relies on sect. 73 of the Excise Management Act, 1827, and sects. 39 and 42 of the Petty Sessions Act, 1851.

Dealing with the entire case, we are of opinion that Mr. Adams had full power to prosecute in the County of Londonderry, and that no authority from the Corporation of the City of Derry was required, and that the other objections fail. We accordingly remit the case to the Justices to proceed according to law.

Solicitor for the appellant: *W. A. Lane.*
Solicitor for the respondent: *T. E. Conaghan.*

J. M'C.

K. B. Div. 1923.

March 10.

H. M. SECRETARY OF STATE FOR WAR *v.* MIDLAND GREAT WESTERN RAILWAY COMPANY OF IRELAND, Ltd. (1).

Carrier—Goods—Liability of Railway Co.—"King's enemies"—Exemption from liability.

While there was in Ireland an internal rebellion, with an army employed to support it, armed raiders took goods from a Railway Company who were common carriers.

Held, that the raiders were "King's enemies," and that the company was not bound to reimburse the owner for the value of the goods so taken.

Appeal from an order of the Recorder of Dublin dismissing with costs a civil bill brought by His Majesty's Secretary of State for War to recover from the Midland Great Western Railway Co. of Ireland, Ltd., £20, being the value of a typewriter which had been sent by the defendants' railway line in December, 1921, from the North Wall Station, consigned to the military authorities in Sligo. The typewriter in due course arrived at the defendant company's railway station in Sligo, and while it was there, on the night of December 15, 1921, the station was raided by armed men, who removed the typewriter, and no trace of it could afterwards be found.

The learned Recorder held that the defendants were common carriers, and as such insurers of the goods they carried; but that they were not responsible for loss, inasmuch as it resulted from an act of the King's enemies.

The plaintiff appealed.

Carrigan K.C. (with him, *Sainsbury*), for the plaintiff:—

The defendants as common carriers were insurers of the typewriter entrusted to them, and they are bound to account for it. There is nothing to show that the persons who took it were "the King's enemies," which means the forces of a foreign army: *Drinkwater* v. *London Assurance Corporation* (2).

Dockrell and *Kelly*, for the defendants:—

The typewriter was taken by persons at war with the King, and therefore King's enemies. It has been decided that a state of war existed in Ireland at the time. The defendants are therefore protected by the exception.

Dodd J.:—

The civil bill is for loss of a typewriter consigned by the War Authorities to some troops at Sligo by the Midland Great Western Railway Co. The typewriter was raided by irregular troops. I am to assume that the railway company are "common

(1) Before Dodd J. (2) 2 Wilson, 363.

carriers," and I am further to assume that there was in Ireland and Sligo at the time "public disorder of such a character that I might regard it as a state of rebellion."

The question for my decision therefore is: Is the company liable?

It is settled law that a common carrier is an insurer of goods, and can be relieved from liability only by the act of God or "the King's enemies." The words were originally applied to carriage by sea, and were there capable of easy interpretation. When extended to land carriage, as they were in the time of Elizabeth, the interpretation was not so easy.

"The law should be such as to provide for the safe conveyance of property, and at the same time protect the carrier against risks the extent of which he cannot know, and therefore cannot determine what precautions are proper for his security": Best C.J., in *Reilly* v. *Horne* (1).

We may gain some insight into the meaning of one of the exemptions by inquiring into the meaning of the other, "the act of God." The ablest Judges have refrained from definition. Each case turns upon its own facts. The phrase that comes closest to a definition is that it is an occurrence from which human agency is eliminated. The risk is one that it is not within human power to avoid.

As to the other exemption, "the King's enemies." If this be confined to foreign foes, as Mr. Carrigan contends it should be, as regards carriage by land it is without anything to act upon, for is it not established by the highest authority that "England never did, nor never shall, lie at the proud foot of a conqueror"? Unless, therefore, the exemption includes civil war, it is without meaning as to transit by land.

One cannot go back to the Wars of the Roses, for the principle as regards carriage by land had not then become operative. It was the merchandise that the commercial enterprise of the Elizabethan period brought to our shores that caused the maxim to be embedded in our common law. It is Judge-made law founded on the principle of the custom of the realm. The exemptions were included, "for the Government itself is called upon to protect its subjects from such hazards, inasmuch as private citizens have not the power to furnish the security and protection required. But by 'enemies' is not to be understood thieves and robbers, who are merely private depredators, however much they may in a sense be at war with society, and so rioters and insurgents are not considered public enemies in the sense of the law upon this subject." I adopt Angell's views upon this. In America the words "King's enemies" were translated into "public enemies."

But there must be war. Enemies to the King's peace are not enemies to the King's Government. Local outbursts do not amount to rebellion. The act of rebelling is "open renunciation of the authority of the government to which one owes

(1) 5 Bing. 217, at p. 219.

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Dodd J.

obedience, and resistance to its officers and laws, either by levying war or aiding others to do so; an organised uprising of subjects in order to coerce or overthrow the lawful ruler or government": Webster.

The term "rebellion" is applied to an insurrection of "large extent, and is usually a war between the legitimate government of a country and portions or provinces of same who seek to throw off their allegiance to it." These words are taken from the Instructions to the Armies of the United States of America at the time of the Civil War, and are probably Abraham Lincoln's own. "Large extent" were words applicable to the magnitude of that memorable war, and are used to indicate something more than civil commotion. Even a traitorous uprising may not be war.

There was one period in English history which might have given rise to a decision. That was during the war between the Parliament and the King. There is no reported case. But is it conceivable that a common carrier entrusted with goods for a consignee at Oxford, when the King's forces were there, would be liable in damages because Oliver Cromwell's troops raided them on the way?

The question did arise once in America on a policy of insurance that had a similar exemption: *Barton* v. *Home Insurance* (1). In that case Wagner J. said: "As far as our investigations have led us, this is a case of new impression in this country; and the reason is manifest, because we have had but one great rebellion in the whole period of our history which would enable the clause to have any force or application." *Drinkwater's Case* (2) was followed and applied by Wagner J. in *Barton's Case* (1), and he quotes with approval the opinion of Wilmot C.J.: "My idea of the words 'burnt by usurped power' from the context is that they mean burnt or set on fire by occasion of an invasion from abroad, or of an internal rebellion, when armies are employed to support it." In *Drinkwater* v. *London Assurance Corporation* (2), Wilmot C.J. includes "internal rebellion" as being within the same category as "invasion from abroad." "Amongst armies, great guns, and bombs the laws are silenced, and the wisdom or courage of an individual will signify nothing"—at p. 365. That case has been dealt with by Mr. Justice Roche in *Curtis & Sons* v. *Mathews* (3) in a way that makes it unnecessary for me to go through it in detail. The gist of the decision is that the acts were the acts of a common mob, dispersed in less than an hour, and acting feloniously, but not treasonably. He says: "I am satisfied that what occurred [in the case before him] was more than a riot, and more than a civil commotion, and was within the war and bombardment clause." If it be guerilla war, one may safely say that is a greater danger to the carrier than a war waged in open conflict.

(1) 97 Am. Dec. 329, at p. 330. (2) 2 Wilson, 363.
(3) [1916] 2 K. B., at p. 825.

In the light of such authorities, and in the view that I take of the meaning of the phrase "the King's enemies," was there war at the time of the consignment? Every Judge on the Bench has decided in reported cases that there was. The learned Recorder has added the weight of his knowledge and experience.

I desire to add that I have confined my judgment within the limits of the arguments and facts presented. No evidence was adduced. No special contract was relied upon. I have not been asked to consider whether in carrying goods for the War Authorities, when there is a war, railway companies are common carriers, nor whether common carriers in exceptional circumstances cannot by notice or otherwise relieve themselves from liability. I have dealt with the matter as a contract of insurance, solely on the assumption that the defendants are common carriers. I find that there was an internal rebellion, with an army employed to support it, and that in consequence thereof the defendants are exempt from liability. That the loss was caused by armed raiders is not open to question.

I affirm the decision of the learned Recorder, with costs.

Solicitors for the plaintiff: *W. G. Bradley & Son.*
Solicitor for the defendants: *F. de Vere White.*

H. H.

Appeal.
(I. F. S.)
1923.

April 12.

IN THE MATTER OF THE WORKMEN'S COMPENSATION ACT, 1906, AND IN THE MATTER OF AN ARBITRATION BETWEEN JOHN BYRNE, APPLICANT; OWEN CAMPBELL, RESPONDENT (1).

Workmen's Compensation—Accident "arising out of . . . the employment"—Farm labourer engaged in forking hay kicks a detonator—Explosion—Injury—Workmen's Compensation Act, 1906 (6 *Ed.* 7, *c.* 58), *sect.* 1, *sub-sect.* 1.

A farm labourer whilst engaged in forking hay for his employer kicked out of his way what appeared to him to be a screw or bolt, but was, in fact, a detonator. The detonator exploded, and the workman sustained injuries which resulted in the loss of the sight of one of his eyes. Some time prior to the accident armed forces opposed to the Government had camped in the haggard, and it was supposed that they had left the detonator in or near the hay.

Held, that the accident arose out of the employment.

APPEAL from an award, dated February 1st, 1923, made by the County Court Judge of Louth, whereby he granted certain weekly payments to the applicant—first in respect of total incapacity, and next in respect of partial incapacity.

John Byrne, the applicant, was a farm labourer. On the 9th August, 1922, he was engaged forking hay in the haggard of his employer, the respondent. He noticed what he thought was a screw or a bolt on the ground. He gave it a kick. It exploded, and part of it struck him in the left eye. He had lost the sight of that eye. What he took at first to be a screw or bolt was a detonator. About a month before the accident the irregulars were camping in the haggard, and it was supposed that they had left the detonator in or near the hay.

The applicant was totally incapacitated from August 9th, 1922, until November 15th, 1922. His wages before the accident had been at the rate of £34 per annum, plus board and lodging. Since November 15th, 1922, he had been employed at a rate of wages which, apart from board and lodging, came to £26 a year.

No evidence was called on behalf of the respondent.

The learned County Court Judge found that in the special circumstances of the case (and especially the fact that no explanation was given by the respondent of the circumstances under which the men were camping in his haggard) that the applicant was injured by accident arising out of and in the course of his employment. He found that the average weekly earnings before the accident were £1 8s. He awarded 14s. for compensation and 10s. 6d. bonus, making altogether £1 4s. 6d. per week from August 9th, 1922, until November 15th, 1922. He found that as from November 15th, 1922, the applicant was partially incapacitated, and entitled to 2s. 6d. weekly from that date until further order in respect of that incapacity.

(1) Before O'CONNOR M.R., and RONAN and O'CONNOR L.JJ.

Maguire, for the appellant :—

The accident did not arise out of and in the course of the employment : *Allcock* v. *Rogers* (1). He was not engaged in a warlike employment, and in forking the hay he did not run any special risk.

Serjeant Hanna (with him *Geoghegan*), for the respondent :—

This case is governed by *Jones* v. *Ynysarwed Colliery Co.* (2).

O'CONNOR M.R. :—

It is the opinion of the Court that the award of the County Court Judge should be affirmed. The workman discharged the onus cast upon him of showing that an accident occurred to him, and that it arose out of and in the course of his employment. In the performance of his duty he was working in a haggard. He saw something on the ground. He kicked it, not knowing what it was; it exploded and caused the accident. This occurred during working hours, and in the place where the workman was bound to be. The case is quite distinguishable from those which have been referred to, where the accidents occurred in public thoroughfares, not as a result of any special duty which was being performed by the workman, but because he was only exposed to the common risks which every member of the community incurs whether employed or unemployed. The appeal must be dismissed with costs.

RONAN L.J.* :—

In my opinion this case is governed by *Dennis* v. *A. J. White & Co.* (3). That case overruled *Sheldon v. Needham* (4), and laid down that the words "arising out of the employment" were of wider application than the Courts had formerly acted upon, and were not to be restricted to a risk arising from the nature of the employment. In *Sheldon* v. *Needham* (4) it had been decided that, where a woman who had been sent by her employer to post a letter, slipped on a banana skin and broke her leg, the accident did not arise out of the employment, on the ground that it was due to a risk not greater than was run by all members of the public. In view of the decision in *Dennis* v. *A. J. White & Co.* (3), risks common to mankind may now be disregarded. All that is required to be shown is that the applicant was doing the work of his employer, and that while so engaged he was injured by accident.

* This judgment has not been revised by Ronan L.J.

(1) 11 B. W. C. C. 149.
(2) 14 B. W. C. C. 111.
(3) [1917] A. C. 479.
(4) 7 B. W. C. C. 471.

Appeal.
(*I. F. S.*)
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BYRNE
v.
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O'CONNOR L.J. :—

I agree. This is a very simple case, and no other arbitrator could have come to a different conclusion. On the occasion of the accident the premises were dangerous by reason of the presence, unknown to the employee and the employer, of a detonator or bomb. Whilst engaged in the discharge of his duty the workman put the article out of his way. It seems to me the case is the same as if the applicant had been injured by a spike in the ground.

Solicitors for the appellant: *William Smyth & Son.*
Solicitor for the respondent: *Michael Hearty.*

C. L.

THE KING (SLEVIN) *v.* THE CHAIRMAN OF QUARTER SESSIONS OF THE COUNTY OF LONGFORD (1).

Appeal.
(I. F. S.)
1923.
May 1.

Licensing Acts—Transfer—Expired licences—Order of Quarter Sessions—Certiorari—Licensing Act, 1825 (6 *Geo.* 4, *c.* 81), *sect.* 11—*Licensing* (*Ir.*) *Act*, 1902 (2 *Ed.* 7, *c.* 18), *sect.* 2.

Three adjoining houses, one licensed, one a hotel, and one a hardware shop, were burnt down. The licence was allowed to expire. Afterwards the owner rebuilt the hardware shop, and applied for and obtained from the Chairman of Quarter Sessions a transfer of the licence to the new premises. On an application for a writ of certiorari to quash the order granting the transfer:

Held (affirming the King's Bench Division), that the writ should issue on the ground that sect. 11 of the Licensing Act, 1825 (6 Geo. 4, c. 81), authorised a transfer for the purpose of carrying on the business in premises other than those burnt or otherwise destroyed only during the period while the licence was operative.

The licence applied for would be a wholly new licence for premises not previously licensed, and absolutely prohibited by the Licensing (Ir.) Act, 1902 (2 Ed. 7, c. 18), sect. 2.

APPEAL from an order of the King's Bench Division, dated March 26th, 1923, which directed the issue of a writ of certiorari to quash an order of the Chairman of Quarter Sessions granting a transfer of a retail licence to certain premises in Main Street, in the town of Granard, from other premises in the same town situate at the corner of Market House Street and Main Street.

The facts are stated at page 79, ante.

Price K.C. and *Geoghegan*, for the appellant:—

Under sect. 11 of the Licensing Act, 1825 (6 Geo. 4, c. 81), in case licensed premises are burnt down or otherwise destroyed or rendered uninhabitable, power is given to the Excise authorities "to authorise and empower by indorsement on such licence, or otherwise, as the Commissioners of Excise shall direct, the person or persons authorised to carry on trade or business by such licence at the house or premises so burnt down or otherwise destroyed or rendered uninhabitable to carry on such trade or business at any other and different house or premises in the same district or place." A certificate from Justices at Quarter Sessions had to be produced to the Excise authorities to enable them to grant authority to trade in other premises. Two questions arise in the case—namely, 1, whether the application for a certificate and the granting of authority must take place pending the life of the licensee of the destroyed premises; 2, assuming that there was no limitation as to time, whether the Licensing (Ir.) Act, 1902 (2 Ed. 7, c. 18), prohibiting the granting of new licences, applies.

There is no express restriction as to time in sect. 11 of the Act of 1825. In sect. 21 of the Act, dealing with the death or

(1) Before O'CONNOR M.R., and RONAN and O'CONNOR L.JJ.

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R. (SLEVIN) *v.* LONGFORD JUSTICES.

removal of a licensee, the authority to executors, administrators, or assigns to carry on the business is restricted to the residue of the term of the original licence. In sect. 11 the Act deliberately left out any limitation as to time; and we submit that by implication there is no such limitation. There is a similar provision to that in sect. 11 in the English Act of 9 Geo. 4, c. 61, sect. 14; and in *The Queen* v. *Justices of Liverpool* (1) it was held that it was not necessary that the application should be made before the expiration of the period for which the old licence was in force. There the Court declined to imply a limit where none was expressed.

Does the Licensing (Ir.) Act, 1902 (2 Ed. 7, c. 18), apply? Section 2 enacts that no new licence shall be granted "except for premises which are now licensed, or which were licensed at any time since the 1st day of January, 1902"; but sect. 7 provides that nothing in the Act shall be taken to affect the law as to the transfer or assignment of licences from one person to another, or as to the renewal of licences. What was granted here was an authority to carry on the business as distinguished from a new licence: see *Price* v. *James* (2). That authority was in substance a renewal of the old licence. It was a statutory right attached to the old licence enabling the licensee to carry on the trade in other premises.

Serjeant Hanna (with him *Connolly*), for the respondent, Laurence D. Kiernan:—

What Mr. Kiernan applied for was a certificate entitling him to receive a transfer of the licence from the corner house to the new premises; but on February 10th, 1923, there was no licence in respect of the burnt premises in existence. There was therefore nothing to transfer.

Price K.C., in reply.

O'CONNOR M.R.:—

We are of opinion that this appeal should be dismissed. The case turns on the meaning of sect. 11 of 9 Geo. 4, c. 81. This enacts that in all cases in which the house or premises in respect of which any Excise licence is or shall be granted shall be burnt down or otherwise destroyed or rendered uninhabitable by fire or other unavoidable cause or accident, it shall and may be lawful for the Commissioners and Assistant Commissioners of Excise, or Collector and Supervisor, or other person or persons authorised to grant licences within the district or place in which such house or premises was or were situate, upon due notice thereof to him or them in that behalf given, to authorise and empower by indorsement on such licence or otherwise, as the Commissioners of Excise shall direct, the person or persons authorised to carry on trade or business by such licence at the house or premises so burnt down or otherwise destroyed or

(1) 11 Q. B. D. 638. (2) [1892] 2 Q. B. 428.

rendered uninhabitable, to carry on such trade or business at any other or different house or premises in the same district or place.

The object of this section was to make provision for a calamity which, without such provision, might result in the loss of an existing licence. It gave an opportunity to the licensee to carry on his trade under the licence at premises other than those for which it was given. It made provision against a break in the trade which had been carried on. This appears to me to have been the object and intention of the section. It enabled the transfer of the trade from the destroyed premises to other premises to be there carried on under the authority of the licence existing at the date of the fire. It presupposed the continued existence of the licence at the date of transfer, with a modification of the provision therein as to the place over which it was to operate. It was not intended that the licence should be allowed to expire, and that after a lapse of time from the expiration thereof a new licence should be granted for new premises. This would have involved the break in the business which it was the object of the section to avoid. The language of the section is only consistent with a transfer during the period when the licence is operative. It is to be carried out by "indorsement on such licence." and it is the person authorised to carry on trade or business by "such licence" who is to carry on the trade in the new premises. In the present case the licence expired on the 10th October, 1921. The application for the transfer was not made until December, 1922, when there was no licence in existence. The section of the Act I have mentioned did not authorise the application.

We are faced then with an application for a licence for premises which were not previously licensed; and it is impossible to escape from the Act of 1902. Section 2 of this Act enacts that from and after its passing no licence shall be granted for the sale of intoxicating liquors, whether for consumption on or off the premises, except for premises which were then licensed, or which were licensed at any time since the 1st January, 1902, and hotels and railway refreshment rooms. The licence applied for would be a wholly new licence for premises not previously licensed, and absolutely prohibited by the Act of 1902.

RONAN and O'CONNOR L.JJ. concurred.

Solicitor for the appellant: *F. J. Magan.*
Solicitor for the respondent: *C. J. P. Farrell.*

C. L.

Appeal. (*I. F. S.*) 1923.

MARY A. E. M'KENNA, Plaintiff, *v.* HARRY STEPHENS and ALEXANDER E. HULL & Co., Defendants (1).

Feb. 19, 20. May 16.

Negligence—Obstruction on footpath—Passenger leaving footpath for carriage-way injured by negligence of third person—Liability of third person—Hoarding erected by licence—Proximate cause—Statutory condition—Breach—Remoteness of damage.

The plaintiff A, a foot-passenger, whilst lawfully walking on the footpath of a crowded street in the City of Dublin meeting with an obstruction, viz., a hoarding erected by licence of the Corporation by B in front of premises undergoing repair, stepped on to the roadway. She proceeded alongside the hoarding, and when just past it, but before she had time to remount the footpath, was overtaken by a military motor lorry driven by C, and was knocked down and injured. The hoarding when first erected was provided with a footway and hand-rail for passengers passing in front of the premises in accordance with statutory requirements, but these had been removed by B by direction, it was alleged, of a subordinate official of the local authority some years before the date of the accident. In an action by A against B and C for negligence, the jury found that B was negligent in not providing a safe footway for passengers in front of the hoarding, and in not complying with the conditions of the statutory licence authorising the erection of the hoarding, and that such negligence conduced to the happening of the accident; and they also found that C was negligent in going too fast, in not giving notice of his approach, and in not having his lorry under control, and they awarded the plaintiff £2,700 damages. The Judge at the trial entered judgment for C, who, by leave, pleaded the Public Authorities' Protection Act, the action not having been brought within six months of the occurrence. Judgment was entered against B for £2,700. On motion by B for judgment or for a new trial, on the grounds that there was no evidence against him either of negligence or of nuisance, and that the damage was too remote:

Held, by the Court of Appeal (Molony C.J. and Ronan L.J., O'Connor L.J. dissentiente), that there being evidence to support the findings of the jury, the plaintiff was entitled to judgment.

Per Ronan L.J. (approving of the statement in Sir F. Pollock's work on Torts, 11th ed., p. 473): Where negligent acts of two or more independent persons have between them caused damage to a third, he is entitled . . . to sue all or any of the negligent persons."

The terms of the licence and the breach of them were ample evidence of negligence on the part of the defendants.

Per O'Connor L.J.: A person placing an obstruction on a footpath, and thereby compelling another to walk out on to a carriage-way, does not insure him against injury from the negligence of a third party.

The negligence of the third party is the cause of the accident, not the presence of the injured person on the spot where the negligence is operative.

New Trial Motion.

The defendants, Alexander Hull & Co., applied for an order that the verdict and judgment dated the 14th December, 1922, be set aside, and in lieu thereof that judgment be entered for them, or in the alternative that a new trial of the action be ordered, on the grounds that the learned Judge should have complied with the application of the appellants' counsel for a direction that judgment be entered for the appellants on the following grounds:—That the learned Judge (Dodd J.) wrongfully excluded evidence tendered by the appellants as to instructions

(1) Before Molony C.J., and Ronan and O'Connor L.JJ.

from persons acting on behalf of the Corporation; that the learned Judge misdirected the jury in law, as set out in counsel's objection to the charge; that on the answers to questions 7 (*a*), (*b*), the appellants were entitled to judgment; that the plaintiff should not have been given leave to amend the cause of action to nuisance after the evidence had closed, the original cause of action pleaded and opened being negligence; that the finding of the jury as to the appellants was inconsistent; and that the answers to 3 (*a*), (*b*), 4, and 6 were against evidence and the weight of evidence; and that the damages were excessive; and that the trial was unsatisfactory for the reasons stated.

The plaintiff, the assistant manageress of the Scotch Wool Co., 16 Suffolk Street, Dublin, in the statement of claim set out her cause of action as follows:—

1. On and prior to the 4th day of February, 1921, the defendants, Alexander Hull & Co., had unlawfully placed an obstruction on the public thoroughfare in Suffolk Street aforesaid, which obstruction prevented persons lawfully using the said thoroughfare in the manner in which they were legally entitled to use same.

2. On the said 4th day of February, 1921, the plaintiff was lawfully using the said thoroughfare in Suffolk Street aforesaid when, by reason of the said illegal obstruction so placed there as aforesaid by the defendants, Alexander Hull & Co., she was knocked down, and sustained the injuries and loss hereinafter mentioned.

3. On the said 4th day of February, 1921, the plaintiff was lawfully using the said thoroughfare in Suffolk Street when the defendant, Harry Stephens, so negligently and unskilfully drove and managed a motor lorry in the said thoroughfare, and in the immediate vicinity of the said obstruction, that the said motor lorry was driven with great force against and struck the plaintiff, and caused her severe personal injuries—namely, her right leg below the knee was almost severed from the body, and had to be amputated afterwards from the right knee joint; the muscles, nerves, and arteries of her leg were torn and both bones broken, and she sustained severe lacerations and contusions and other injuries to various parts of her body, and suffered other personal loss and damage.

4. The injuries sustained by the plaintiff on the occasion hereinbefore referred to were occasioned by the joint and concurrent negligence of the defendants, Alexander Hull & Co., in placing the obstruction mentioned on the public thoroughfare, and the negligence of the defendant, Harry Stephens, in the driving and management of a motor lorry on the same occasion, both of which acts of negligence were the cause of the accident complained of in this action.

The defendants, in each of their defences, in addition to the usual traverses, pleaded contributory negligence on the part of

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the plaintiff; and the defendants Hull & Co. further pleaded that "If any obstruction was erected by these defendants, as alleged, the same was erected in pursuance of a licence granted by the Dublin Corporation, acting under their statutory powers enabling them in that behalf, to these defendants and not otherwise, and the said obstruction was erected in accordance with the terms and conditions of the said licence in a lawful manner, and without any negligence on the part of these defendants;" and that "the statement of claim is bad in law, and discloses no cause of action against them."

By way of further defence, made in pursuance of leave given, the defendants Hull & Co. say "that the obstruction complained of was erected pursuant to and in conformity with the provisions of the Public Health Act, 1890, sect. 34, sub-s. 1; and at the time of the occurrence referred to in the statement of claim was in a condition complying with the said provisions."

The defendant Stephens was granted leave to plead a new defence, and relied on the Public Authorities' Protection Act, 1893.

The plaintiff claimed £5,000 damages.

The action was tried on the 12th, 13th, and 14th December, 1922.

The plaintiff deposed that on the date of the occurrence she left her place of business at 2.30 p.m., and was going to the Bank of Ireland, College Green, with money. "I went on straight towards St. Andrew Street. Just as I came to a hoarding I had to get out on the roadway. The hoarding to my left. No railing round the hoarding. I had not got to the end of the hoarding when a military motor came and knocked me down. I was walking along close to the hoarding. The car knocked me down towards the pathway. I remember being taken up. Heard man say, 'Drive to Meath Hospital.'" And in cross-examination:—"I was not past the hoarding. I was coming to the end when the car dashed me on to the footpath. The lorry stopped when I was knocked down. I did not look round. I was close into the hoarding." Patrick O'Reilly, in the course of his evidence, said:—"She (the plaintiff) had not passed the hoarding . . . Car carried her past on to footpath;" and Joseph Dudgeon deposed that he saw the young lady carrying a bag—"I saw the lorry was going to hit her. So far as I could see, he failed to get the car out of the rut. He was doing his best. The thing was very quick. She had almost cleared the hoarding."

Evidence was given that the hoarding erected by the defendants Hull & Co. extended to the full width of the footpath, 5 feet 8 inches wide. The width of the street was 26 feet 6½ inches. On behalf of the defendants Hull & Co., the foreman on the job said: "The hoarding erected by me had footway in front of it about one week. I was directed by some one to remove it. An official of the Corporation directed me." Mr. Arthur Chance, Assistant Engineer, deposed:—"Staff and inspectors attached to

my office. No rules. Procedure of servants regulated by custom. Duty of inspectors is to see that it (sic) is erected in accordance. He has some discretionary power. Any inspector has a right by custom to have that footway taken away altogether."

Harry Stephens, a private in the R.A.S.C., said that on the date of the accident he was driving a three-ton lorry from Ballsbridge to Island Bridge. "I was on left-hand middle of the street; roadway greasy; five or six miles an hour. I saw a lady walking along, and the lorry began to skid a bit. The lady was half way along the hoarding. I pulled out to give her a little more room. Just then the motor began to skid. I did all I could to prevent it. I was just coming up. I saw her; pulled out to give her a little room. Then the lorry skidded. I struck the hoarding and the lady at the same time. It was my hind wheel caught the hoarding."

The following requisitions were entered by counsel for Hull & Co.:—

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I respectfully ask your Lordship for a direction:—

1. No evidence of negligence.
2. No evidence that it is a nuisance.
3. Damages too remote from the alleged negligence or nuisance.

The learned Judge allowed the case to go to the jury, and counsel for Hull & Co. requested his Lordship to put the following question:—

"Was the hoarding at the time of the occurrence in a condition satisfactory to the Assistant Borough Surveyor and the Inspector on behalf of the Dublin Corporation?"

The following questions were submitted to the jury, and answered as hereinafter mentioned:—

1. Whether the defendant Stephens was negligent? Answer, "Yes."

(*a*) In going too fast at the time and under the conditions existing at the time? Answer, "Yes."

(*b*) In not giving notice of his approach to the lady in front of his car? Answer, "Yes."

(*c*) In not having his lorry under reasonable control? Answer, "Yes."

2. Whether, if so, such negligence directly conduced to the injuries to the plaintiff? Answer, "Yes."

3. Whether the defendants Alexander Hull & Co. were negligent? "Yes," for removing hand-rail.

(*a*) In not taking reasonable precautions in providing a reasonably safe footway for passengers lawfully passing in front of his premises? "Yes."

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(*b*) In not complying with the conditions of the licence from the Corporation authorizing the erecting of the hoarding? Answer, "Yes."

4. Whether, if so, such negligence so directly conduced to the happening of the occurrence that but for such negligence the occurrence would not have happened? Answer, "It did."

5. Whether the defendant Stephens at the time of the occurrence was acting in discharge of duties as a soldier under the military authorities? Answer, "Yes."

6. Whether the occurrence was caused by the combined negligence of Stephens and the defendants Hull & Co.? Answer, "Yes."

PAPER 2.

7. (*a*) Did the motor lorry hit the plaintiff before she had passed the hoarding? Answer, "No; but plaintiff had not sufficient time to mount footpath."

(*b*) Was the hoarding at the time of the occurrence in a condition satisfactory to the Assistant Borough Surveyor and the inspector? Answer, "Yes."

Upon these findings the jury found for the plaintiff, with £2,700 damages.

The Judge gave judgment for the plaintiff against the defendants Alexander Hull & Co. for £2,700 with costs, and ordered that execution be stayed until the second day of next (Hilary) Sittings; and, in the event of the defendants within that period serving notice of motion for a new trial or otherwise to impeach the verdict, execution be further stayed until such motion should have been disposed of by the Court of Appeal; and gave judgment in favour of the defendant Harry Stephens on the new defence, and ordered that he do pay all costs in the action since the 22nd May, 1922, up to the trial, and that he do have his costs of the trial, costs to be set off; and the Judge allowed the pleadings to be completed, and any pleading requisite to ground the questions put by the Judge to be presumed to have been made, and the Judge certified for a special jury, plaintiff's discovery, and interrogatories.

After the learned Judge had charged the jury, counsel for Hull & Co. respectfully objected to his Lordship directing the jury on the question (A) as to whether Hull & Co. were negligent in not complying with the licence on the grounds:—

1. That even the Corporation had no right to waive a condition in the licence for public safety.

2. That an inspector or surveyor had no authority to order removal of the footpath or approve of same.

3. And that in effect they were bound to answer the question against defendant Hull.

(B) That when the jury reported that they could not agree on the question, as they had no evidence as to who ordered the

removal of platform rail, his Lordship said in effect that that was immaterial, as no one had the right to alter the licence. This misled the jury on the question of negligence, as, if the contractor obeyed the authorized Corporation official, he could not be guilty of negligence.

(C) On juror saying that the Corporation was to blame, his Lordship said that even if Corporation negligent, it did not exonerate Hull.

(D) I also object to your Lordship illustrating this case by Devlin's Case and Lynam's Case, as this on the evidence is not a case of concurrent negligence.

The learned Judge, in the course of his report, said :—

"I framed the questions as they appear in the certificate, and charged the jury on the lines indicated by the questions.

"I put to the jury the two questions suggested by Serjeant Hanna. The answers also appear in the certificate.

"As to the other requisitions, my charge is not accurately referred to.

"I did tell the jury that it had been decided that a bye-law made by a public sanitary authority for the public safety could not be waived by the authority. Whether the same rule applied to a licence which the statute required to be in writing I did not judicially decide. But I saw no authority for permitting a subordinate officer of the Corporation to alter the conditions of the licence. 1. The jury did not say they could not agree on the question. 2. They said they had no evidence as to who ordered the removal of the platform. I assented, and said it lay upon the defendant to prove who ordered it. The statements were of the vaguest. If it had been done by an official with authority, or without authority, one would expect clearer evidence than was given. 3. That the Serjeant is in error is manifest, for the jury did find it in his favour. I said I did not think the question material. My reference to Devlin's case was not an illustration. It was a statement of the law as I applied it, and was the foundation of some of my questions."

S. L. Brown K.C., Carrigan K.C. (with them *Sainsbury*), for the defendant Stephens.

Serjeant Hanna K.C., Sullivan K.C. (with them *Tobias*), for the defendants Hull & Co. :—

There is no evidence of negligence or of nuisance (refers to evidence). The damage did not flow from any act of Messrs. Hull & Co. There is no causal relation between the erection of the hoarding and the accident. If every condition of the licence had been complied with, the accident would have occurred. Stephens, the driver of the lorry, was guilty of negligence, and this action is an effort to make Hull & Co. pay for his negligence. The plaintiff lawfully on the roadway seeks to recover damages

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from the defendants Hull & Co., who were guilty of no negligence, for the admitted negligence of the defendant Stephens. The Court should not allow such a claim.

As regards the amount of damages awarded, the verdict is an extraordinary one, having regard to the standard of damages usually given in this country in these cases.

Conner K.C. and *Lynch K.C.* (with them *Moore* and *Hughes*), for the plaintiff :—

The licence is definite and clear. It requires the platform and rail to be put up, which would have made the place safe. It is alleged that it was put up; but, if so, it could only have been removed by the direction of the Borough Surveyor under clause 13 of the licence. There is no evidence that any such direction was given, and it appears both by the requisition of Serjeant Hanna and from the learned Judge's report that the jury were of that opinion, and said so. If the defendants had relied on any direction by the Borough Surveyor, they should have asked this question to be left to the jury; but they did not do so, as the jury obviously would have found against them. The vague finding that the hoarding was to the satisfaction of the assistant engineer is immaterial. The action is for negligence, and it cannot be suggested that the assistant engineer, looking at the place and being satisfied with it, justified the proprietor in creating a nuisance there. Compliance with the Corporation licence, if it were complied with, is only evidence that there was no negligence by the defendant. The Corporation have no power to authorize anyone to create a nuisance or to be guilty of negligence.

The effect of a licence under sect. 47 of the Dublin Corporation Act, 1890, is to relieve the licensee from certain penalties; it has no further effect. It is not necessary for us to argue whether an action could be brought by a member of the public for damages caused by breach of the licence. This action is not founded on breach of a statutory duty, but is an action for negligence and nuisance.

It is suggested that the damages were too remote. It is a question of fact whether there may not be quite a different risk of danger upon the footpath as compared with the street. What happened in the present case shows that there is. The occurrence might well have happened by reason of the skidding of the lorry without any negligence of the driver, and solely by Hulls' negligence. Neither in the defence of Messrs. Hull nor in their answers to our interrogatories did they suggest that any responsible Corporation official had given any direction as to the removal of the platform and railing. The jury have found negligence; there was evidence to sustain their finding; and the verdict ought to stand.

Authorities cited and discussed:—*Groves* v. *Wimborne* (1); *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (2); *Couch* v. *Steele* (3); *Saunders* v. *The Holborn District Board of Works* (4); *Herring, App.*; *The Metropolitan Board of Works, Resp.* (5); *Phillips* v. *Britannia Hygienic Laundry Co., Ltd.* (6); *Ward* v. *Hobbs* (7); *Clegg, Parkinson, & Co.* v. *Earby Gas Co.* (8); *Dawson & Co.* v. *Bingley Urban District Council* (9); *Heath's Garage, Ltd.*, v. *Hodges* (10); *Sharp* v. *Powell* (11); *In re Polemis and Furness, Withy, & Co.* (12).

MOLONY C.J.:—

This is an application on the part of the defendants, Alexander Hull & Co., to set aside a judgment which was entered for the plaintiff against the defendant company at the trial of the action before Mr. Justice Dodd and a special jury of the City of Dublin, and to enter judgment for the defendant company, or in the alternative for a new trial.

The defendant company were contractors for the execution of certain works at 23 Suffolk Street, Dublin, and for that purpose it was necessary to erect a hoarding on the public thoroughfare. The plaintiff was the assistant manageress of the Scotch Woollen Co., of 16 Suffolk Street; and on 4th February, 1921, she was sent to lodge money in the Bank of Ireland, and she accordingly proceeded along the footway at Suffolk Street until she came to the hoarding erected by the defendant company, and she was then compelled, in order to proceed on her errand, to step on to the carriage-way. When she was on the carriage-way she was struck by a motor lorry belonging to the Motor Transport of the Royal Army Service Corps, and driven by the defendant Stephens; and accordingly this action was brought against Stephens and the defendant company for the injuries sustained by her owing to the alleged negligence of the defendant company in placing an obstruction on the public street, and the alleged negligence of the defendant Stephens in the driving and management of the motor lorry

At the close of the plaintiff's case Mr. Brown, for the defendant Stephens, asked for a direction on the ground that there was no evidence of negligence against him; and Serjeant Hanna, on behalf of the defendant company, also asked for a direction on the ground that (1) there was no evidence of negligence or nuisance, and (2) that the damages were too remote. These requisitions were repeated at the close of the trial, and after some discussion the Judge left certain questions to the jury in reference to both the defendants.

(1) [1898] 2 Q. B. 402.
(2) L. R. 6 Exch. 404; L. R. 2 Exch. Div. 441.
(3) 3 El. & Bl. 402.
(4) [1895] 1 Q. B. 64.
(5) 19 C. B. N. S. 510.
(6) [1923] W. N. 47.
(7) 4 A. C. 13.
(8) [1896] 1 Q. B. 592.
(9) [1911] 2 K. B. 149.
(10) [1916] 1 K. B. 206; [1916] 2 K. B. 370.
(11) L. R. 7 C. P. 253.
(12) [1921] 3 K. B. 560.

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As regards the defendant Stephens, the jury found that he was negligent, and that his negligence had directly conduced to the injuries of the plaintiff.

As regards the defendant company, they found that they were negligent in not taking reasonable precautions in providing a reasonably safe footway for passengers lawfully passing in front of the premises, and also with not complying with the conditions of the licence from the Corporation authorizing the erection of the hoarding, and that such negligence conduced to the happening of the accident, which they also found was caused by the combined negligence of Stephens and the defendant company.

At the request of Serjeant Hanna, for the defendant company, two further questions were put to the jury—namely, (*a*) did the motor lorry hit the plaintiff before she had passed the hoarding? and the answer was "No, but the plaintiff had not sufficient time to mount the footway;" and (*b*) was the hoarding at the time of the occurrence in a condition satisfactory to the Assistant Borough Surveyor and the Inspector? to which the answer was "Yes."

The jury assessed the damages at £2,700, and judgment was given for this sum against the defendant company; the defendant Stephens was, however, successful in pleading the Public Authorities' Protection Act, the action not having been brought within six months of the occurrence, and consequently he obtained judgment on this technical point.

This case raises most important issues as to the responsibility of a person who places an obstruction on a public footway, and thereby necessarily compels foot-passengers to go on the carriageway.

The plaintiff relies upon the absence of a platform and hand-rail outside the hoarding, which would effectually separate foot-passengers from carriage traffic; and it appears that when the hoarding was first erected this protection was provided, but was subsequently removed; and the jury have found that the removal of the hand-rail was a negligent act. The defendant company, on the other hand, allege that the removal of the hand-rail was directed by the authority of the officials of the Corporation, to whose instructions they were bound to conform; and the jury have, in fact, found that the hoarding, at the time of the occurrence, was in a condition satisfactory to the Assistant Borough Surveyor and the inspector.

At this stage it is necessary to form a clear view as to the powers of control exercisable by the Corporation as the road authority.

Under sect. 34, sub-s. 1, of the Public Health Acts Amendment Act, 1890, every person intending to build or take down any building, or to alter or repair the outer part of any building in any street or court, shall—

(*a*) Before beginning the same, unless the urban authority

otherwise consent in writing, cause close-boarded hoards or fences, to the satisfaction of the urban authority, to be put up in order to separate the building from the street or court.

(*b*) If the urban authority so require, make a convenient covered platform and hand-rail to serve as a footway for passengers outside of such hoard or fence.

(*c*) Continue such hoard or fence with such platform and hand-rail as aforesaid standing and in good condition to the satisfaction of the urban authority during such time as they may require.

(*d*) If required by the urban authority, cause the same to be sufficiently lighted during the night.

(*e*) Remove the same when required by the urban authority.

The penalty provided for a breach of the section is £5, and in addition a daily penalty not exceeding 40s.

A somewhat similar provision is contained in sect. 47, sub-s. 1, of the Dublin Corporation Act, 1890, which is as follows :—

"1. It shall not be lawful for any person to erect or set up in any street any hoard, fence, or scaffold for any purpose whatever, or any posts, bars, rails, hoards, or other things by way of enclosure for the purpose of erecting, repairing, or removing any structure, or of making mortar or of depositing bricks, lime, rubbish, or other materials without a licence in writing first had and obtained from the Corporation, and every such licence shall state the place where such hoard, fence, or enclosure is to be set up or made, and the size thereof, and the time for which it is to be permitted to continue, and any conditions to be observed by the grantee of the licence.

"2. For every such licence there shall be paid such reasonable fee as shall from time to time be fixed by the Corporation.

"3. Any person offending against the provisions of this section shall be liable to a penalty not exceeding £5, and to a daily penalty not exceeding 20s."

Acting under the provisions of both these sections, the Corporation, on the 3rd June, 1918, gave a licence to the Motor Union Insurance Co., Ltd., for whom the defendant company were contractors, to erect the hoarding in question; and the licence was granted subject to certain conditions, to some of which it is necessary to refer.

Condition 1 provides that no work shall be executed until the hoarding has been erected; and Condition 2 that a portion of the existing footway, at least 5 feet in width, or a timber platform of said width, shall be substituted. Condition 3 provides that the platform shall be firmly constructed of planks, and that it shall also have a strong hand-rail, which, together with the platform, shall extend the whole length of the works and be returned at each end to the footway. Condition 5 provides that the public shall not be excluded from any portion of the footway until the platform, hoards, hand-rail, &c., shall have been placed to the

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satisfaction of the Borough Surveyor for the time being. Condition 13 provides that the hoards, platforms, &c., shall be removed immediately when ordered by the Borough Surveyor.

The defendant company say that they complied with all the terms of the licence, and that before commencing the works they erected the platform and hand-rail, but that in a short time they were required to remove same by the Corporation officials, on the ground, apparently, of the narrowness of the roadway. The evidence on this point is rather vague, but was sufficient to satisfy the jury that the hoarding at the time of the occurrence was in a condition satisfactory to the Assistant Borough Surveyor and the inspector. Mr. Hull, the contractor, was handed the licence by the assistant manager of the Motor Union, the owners of the building, and he handed it to his foreman on the job; and he states that the hoarding was erected and the barrier put up, as shown on the model, but that when he went back a few days after, the footway was not there. Leishman, who was the foreman on the job, states that the hoarding was erected by him, and the footway in front of it, but that when it was there about a week he was directed by an official of the Corporation, one of the inspectors who came about the building, to remove it, and he accordingly did.

Mr. Arthur Chance, the Assistant Engineer of the Corporation, states that the staff of inspectors are attached to his office, and that while it was the duty of the inspector to see that the conditions of the licence were adhered to, he had some discretionary power, and that he had a right by custom to have the footway taken away altogether.

The first question to determine is whether there is any evidence upon which the jury could have found the defendant company guilty of negligence; the negligence alleged against them and found by the verdict being that they had removed the platform and hand-rail, and had not provided a reasonably safe footway for passengers lawfully passing in front of the premises, as they were required to do by the conditions of the licence.

It is quite clear that every obstruction of the roadway does not create a cause of action in a person injured or inconvenienced thereby. As was stated by Byles J. in *Herring* v. *Metropolitan Board of Works* (1): "As a general rule, all the Queen's subjects have a right to the free and uninterrupted use of a public way; but, nevertheless, all persons have an equally undoubted right for a proper purpose to impede and obstruct the convenient access of the public through and along the same. Incidents of this interruption arise at every moment of the day. Carts and waggons stop at the doors of shops and warehouses for the purpose of loading and unloading goods. Coal-shoots are opened in the public footway for the purpose of letting in necessary supplies of fuel. So for the purpose of building, rebuilding, or

(1) 19 C.B.N.S. 510, 525.

repairing houses abutting on the public way in populous places hoardings are frequently erected enclosing a part of the way. Houses must be built and rebuilt; and hoarding is necessary in such cases to shield persons passing from danger from falling substances. If this be the right of a private person, a fortiori must it be the right of a public body, to which extensive power is entrusted for the general good of all."

It is clear that it was necessary to erect the hoarding, and that when giving a licence the Corporation considered it necessary that there should be a convenient covered platform and hand-rail to serve as a footway for passengers; this term was embodied in the licence, and was complied with by the contractor, and so far there is no evidence of negligence. The contractor, however, within a week removed the covered platform and hand-rail, and thereby compelled foot-passengers to go upon the carriage-way. In the absence of any justification or excuse, this, I think, raised a prima facie case of negligence which could not be withdrawn from the jury. The defendant company, however, contended that their prima facie liability was negatived by the fact that they were required to take down the footway by an inspector of the Corporation; and I have already referred to the evidence on this point. It seems to me that there is evidence to support the finding of the jury that at the time of the occurrence the hoard was in a condition satisfactory to the Assistant Borough Surveyor and the inspector; but the plaintiff contends that such a finding does not relieve the defendant company from the allegation of negligence because, 1, even the Corporation had no right to waive a condition in the licence for public safety, and, 2, that a surveyor or inspector had no authority to order removal of the footway or approve of its removal.

As regards the first point, sect. 34, sub-s. 1, of the Public Health Acts Amendment Act, 1890, makes it optional with the urban authority to require the footway and hand-rail to be erected; and sect. 47 of the Dublin Corporation Act, 1890, makes it optional with the Corporation to annex such conditions to the licence as they think fit. It must be remembered that in imposing conditions on the licence the Corporation is bound to have regard to all the traffic, both by foot-passengers and vehicles, and they may, in certain circumstances, deem it more in the interests of public safety that there should be no footway and more accommodation provided for vehicles. In the present case, although the licence has been granted accompanied by a condition, it was competent for the Corporation to alter these conditions, and to require the footway to be altered or even removed.

In my opinion, however, the licence, when once granted, could not be altered and its provisions waived by a subordinate officer of the Corporation. The conditions of the licence are intended for the public safety; but it was thought that a discretionary power in certain cases should be given to the Borough Surveyor,

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and such power was given to him by conditions (2), (5), (8), (9), (13), (14), and (17) of the licence. It is not suggested that any of the powers so given were in fact exercised by the Borough Surveyor, or that he had any knowledge of the removal of the platform and hand-rail; and I am unable therefore to see that the finding of the jury that the hoarding at the time of the occurrence was in a condition satisfactory to the Assistant Borough Surveyor or an inspector affords any protection to the defendant company. It is to be noted that while Mr. Arthur Chance is treated in the question as being Assistant Borough Surveyor, he did not so describe himself in the evidence, but as Assistant Engineer; and that no inspector was examined on behalf of the defendant company except one, who said that he did not order the hand-rail to be taken away, as it was not in his district. There is, consequently, evidence to support the finding of the jury as to negligence, and that finding is not displaced by their answer to the additional question which was submitted at the instance of Serjeant Hanna.

The only question which now remains is whether there was evidence to support the finding of the jury in answer to Question 4, that the negligence of the defendant company so directly conduced to the happening of the occurrence that but for such negligence the occurrence would not have happened. This raises the difficult and somewhat complex question as to the causal connexion between the removal of the hand-rail and the happening of the occurrence, in which the plaintiff sustained her injuries. It lies upon the plaintiff to show that the injuries sustained by her were "the direct consequence of the negligence complained of": *Polemis* v. *Furness, Withy, & Co.* (1). It was the duty of the defendants to construct and maintain a platform and hand-rail. If it had been so constructed, the plaintiff would not have had occasion to go upon the roadway, and she would not have been in the place where she was at the time of the occurrence.

It seems to me that there was evidence upon this point which could not be withdrawn from the jury. It is not suggested that the plaintiff was guilty of any negligence, or that any other course was open to her except to go upon the public roadway. I think the case in its main features presents a problem very similar to that which was discussed in the case of *Williams* v. *Great Western Railway Co.* (2). There a railway line crossed a public footpath on the level, but the defendants did not erect any gate or stile, as provided by statute. The plaintiff, a child of four and a half years old, having been sent on an errand, was shortly afterwards found lying on the level crossing, a foot having been cut off by a passing train; and it was held that there was evidence to go to the jury that the accident was caused by the neglect of the defendants to erect a gate or stile. Pollock B.,

(1) [1921] 3 K.B. 560.

(2) L.R. 9 Ex. 157.

having stated that the defendants had neglected to comply with the enactment, said that the real question was whether the negligence could reasonably be so connected with the accident as to allow of a jury saying that it did, in fact, give occasion to it. Amphlett B. puts the case thus: "Then the child being lawfully on the footway, and the defendants being guilty of a breach of duty, the only question is whether there is reasonable ground for connecting this breach of duty with the accident. It is not necessary to decide this as a jury; it is enough to say that I think it is clearly a case which ought to be submitted to a jury. There are many supposable circumstances under which the accident may have happened, and which would connect the accident with neglect. If the child were merely wandering about and he had met with a stile, he would probably have been turned back, and one, at least, of the objects for which the gate or stile is required is to warn people of what is before them, and to make them pause before reaching a dangerous place like a railroad."

In the present case there was a breach of duty on the part of the defendant company. Had that breach of duty not taken place, the plaintiff would not have been on the roadway, and if she had not been on the roadway the injuries would not have been sustained; and I think it is impossible to say in these circumstances that there was no evidence upon which the jury could find that the negligence of the defendant company directly conduced to the happening of the occurrence.

It was also said that even if there was negligence on the part of the defendants, the proximate cause of the occurrence was the negligence of Stephens in driving the lorry; and this brings us to the case of *Hill* v. *New River Co.* (1). There was a public highway, and along it there ran an open ditch, insufficiently fenced and protected. The New River Co., by some defect in their pipes, caused a stream of water to spout on the highway, to the height of about four feet, above the level of the road, and this jet was left unguarded by the servants of the company. The plaintiff's carriage came along the highway, between the spouting stream and the ditch, and the horses, having taken fright at the spouting stream, swerved suddenly aside and fell into the ditch. The defendants contended that they were not liable, as the unfenced excavation was the causa proxima, but the Court (Mellor, Lush, and Hannan JJ.) was of opinion that the spouting water was really the causa causans of the accident, and that without the negligence of the defendants the accident would not have happened, and that they were consequently responsible. Similarly in the present case, the negligence of the defendants caused the plaintiff to be in a position where she could be injured by a lorry, and left it open to the jury to hold that their negligence was the causa causans of the accident.

There are many cases to which reference has been made, but

(1) 9 B. & S. 303.

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the general principles controlling liability, as laid down in *Smith* v. *London and S.W. Railway Co.* (1), *Wild, Blundell,* v. *Stephens* (2), *Polemis* v. *Furness, Withy, & Co.* (3), are not in dispute.

Every case must depend on its own special facts, and it is the duty of the Judge to determine at the trial whether there is any reasonable evidence to be left to the jury from which they can infer (*a*) that there was negligence and (*b*) that the negligence was the direct cause of the injuries complained of. The Judge in the present case properly left the questions to the jury, and the jury have found in favour of the plaintiff.

In my opinion there is evidence to support the findings of the jury, and the plaintiff is entitled to recover in this action, and consequently this motion should be refused with costs.

RONAN L.J.* :—

In this case both my colleagues have been kind enough to give me copies of their judgments. Consequently it will be unnecessary for me to go into the narrative of this case.

My learned colleague, Lord Justice O'Connor, differs in opinion from the judgment of the Lord Chief Justice, so the responsibility for the decision of the Court depends to some extent on my opinion. I have therefore given the case the most anxious consideration, for I consider it one of very grave difficulty. The occurrence took place in Suffolk Street. Suffolk Street is a very short street; but, as we all know, it is part of one of the leading arteries, running east to west, of the City of Dublin. Commencing at Lower Mount Street Bridge, this artery passes through Lower Mount Street, then becomes the north side of Merrion Square, after which it takes the name of Clare Street, then Leinster Street, then Nassau Street, then Suffolk Street, St. Andrew Street, and South William Street; and it was in Suffolk Street, a non-residential business street, and one of the principal streets of Dublin, that this accident occurred.

The next matter I wish to refer to in my judgment goes to the very root of this case, both in point of fact and in point of law. There is a fundamental difference between the footpath and the roadway of a street in a populous city. The footpath is generally higher, the kerbstone rising straight at right angles to the roadway. The path is a place of safety for foot-passengers; the roadway is a place where there is a risk of being run down by vehicles.

The Legislature has over and over again made provision for the exclusive use of the footpath by passengers. The jury in this case plainly and intelligently contemplated the footpath as a place of safety, for their answer to the question, "Did the motor

(1) L. R. 6 C. P. 21. (2) [1920] A. C. 956. (3) [1921] 3 K. B. 560.

* This judgment has not been revised by Ronan L.J.

lorry hit the plaintiff before she had passed the hoarding?" was "No, but plaintiff had not sufficient time to mount footpath;" in other words, had not time to get back into the safety zone. Passengers have a right to use the roadway, but not an exclusive right. The exclusive right of passengers to the footpath has been so far pressed that in one case an attempt was made in argument to oust the innocent babe in a perambulator from the use of the footpath. On an unfrequented country road a person may without much danger walk along the road, but in a street where there is traffic the person who takes to the roadway incurs a definite intelligible risk which he does not incur on the footpath. The user of the roadway of a street in a crowded place is really to cross from one side to the other. In a crowded thoroughfare like Grafton Street or Cheapside to walk up or down the roadway would be evidence of negligence, for you run the chance of a vehicle overtaking you. That is not so in crossing the street, for you can see both sides as you cross over.

The lady in this case was walking up the street, parallel to the kerb, and was overtaken by a vehicle—the danger in question. There is no suggestion—and it goes to the root of this case—that the plaintiff was where she was unlawfully, or that she negligently or improperly took any risk. She was lawfully there, and was absolutely blameless in being there. When we come to consider the authorities, that is a vital fact in this case. When there is negligence on the part of the plaintiff and negligence on the part of the defendant, no doubt the decisions run very fine. But Sir Frederick Pollock in his work—I am reading from the 11th edition of his work on Torts, at p. 473—speaking of a case where the negligence was the negligence of two people, says: "The eminent Judges who invented 'identification' seem to have assumed, rather than concluded, that the plaintiff was bound to show, even in a case where no negligence of his own was alleged, that the defendant's negligence was not only a cause of the damage sustained, but the whole of the cause. But this is not so. The strict analysis of the proximate or immediate cause of the event, the inquiry who could last have prevented the mischief by the exercise of due care, is relevant only where the defendant says that the plaintiff suffered by his own negligence. Where negligent acts of two or more independent persons have between them caused damage to a third, the sufferer is not driven to apply any such analysis to find out whom he can sue. He is entitled—of course within the limits set by the general rules as to remoteness of damage—to sue all or any of the negligent persons." That important principle appears to me to be the governing principle in this case. The plaintiff is not driven where the negligent acts of two or more independent persons have caused the damage to make any analysis as to the proximate or immediate cause of the event. At p. 472 of Sir Frederick Pollock's work I find the following: "Another kind of question

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arises where a person is injured without any fault of his own, but by the combined effects of the negligence of two persons of whom the one is not responsible for the other. It has been supposed that *A* could avail himself as against *Z*, who has been injured without any want of due care on his own part, of the so-called contributory negligence of a third person *B*. 'It is true you were injured by my negligence, but it would not have happened if *B* had not been negligent also; therefore you cannot sue me, or, at all events, not apart from *B*.' Recent authority is decidedly against allowing such a defence, and in one particular class of cases it has been emphatically disallowed. It must, however, be open to *A* to answer to *Z*: 'You were not injured by my negligence at all, but only and wholly by *B*'s.' It seems to be a question of fact rather than of law (as, within the usual limits of a jury's discretion, the question of 'proximate cause' is in all ordinary cases) what respective degrees of connexion, in kind and degree, between the damage suffered by *Z* and the independent negligent conduct of *A* and *B* will make it proper to say that *Z* was injured by the negligence of *A* alone, or of *B* alone, or of both *A* and *B*. But if this last conclusion be arrived at, it is now quite clear that *Z* can sue both *A* and *B*.'' And at p. 198: ''Where more than one person is concerned in the commission of a wrong, the person wronged has his remedy against all or any one or more of them at his choice. Every wrongdoer is liable for the whole damage, and it does not matter . . . whether they acted, as between themselves, as equals, or one of them as agent or servant of another. There are no degrees of responsibility, nothing answering to the distinction in criminal law between principals and accessories.'' And at p. 474: ''It is impossible to lay down rules for determining whether harm has been caused by *A*'s and *B*'s negligence together, or by *A*'s or *B*'s alone. The question is essentially one of fact. There is no reason, however, why joint negligence should not be successive as well as simultaneous, and there is some authority to show that it may be. A wrongful or negligent voluntary act of Peter may create a state of things giving an opportunity for another wrongful or negligent act of John, as well as for pure accidents. If harm is then caused by John's act, which act is of a kind that Peter might have reasonably foreseen, Peter and John may both be liable; and this whether John's act be wilful or not, for many kinds of negligent and wilfully wrongful acts are unhappily common, and a prudent man cannot shut his eyes to the probability that somebody will commit them if temptation is put in the way. One is not entitled to make obvious occasions for negligence.'' This series of principles, together with one other, to which I will now refer, govern this case.

A question has been raised as to the effect of the Corporation licence. The licence is a statutory condition, and on the question as to whether for the breach of a statutory condition an action will lie there is a most interesting judgment of M'Cardie J. in

Phillips v. *Britannia Hygienic Laundry Co.* (1). It is in the April number of the Reports, which appeared subsequent to the hearing of the arguments in this case. Mr. Justice M'Cardie there discusses whether an action will lie for breach of a statutory condition; and after examining the authorities, the conclusion he comes to is this: that where the statutory conditions are for the benefit of a limited class, all persons can sue for the injury; but where they are for the benefit of the public generally, and there are penalties for the breach, an action will not lie. So far as that case goes, it appears to me to be a strong authority for the proposition that an action will not lie for the breach of the Corporation conditions alone.

The question to be considered is for whose benefit the Act was passed—whether it was passed in the interests of the public at large, or in those of a particular class of persons. If for the public at large, the individual cannot sue for the damage done. But Mr. Justice M'Cardie says: "I agree, however, that the breach of a statutory regulation will usually afford prima facie evidence of negligence;" and later on in his judgment he adds: "The point now raised has not been suggested in the numerous cases of accident which have been before the Nisi Prius Courts and the Court of Appeal. In every case, I believe, the allegation has been that of negligence, and the breach of a statutory regulation has been alleged, not as a cause of action in itself, but as evidence of a breach of the common law duty to take due care." Now, that is common sense. The licence in this case has been put in evidence by the defendant. The jury were at perfect liberty to consider the conditions which the responsible body, the Corporation, had thought necessary for the protection of the public on the streets. Protection from what? From being run down by vehicles. The licence in this case, given under the statutes, contains the only information we are afforded as to the conditions of the Corporation; and in my opinion the terms of the licence and the breach of them are ample evidence of negligence on the part of the defendants in this case. Now, was that negligence part of the cause of the accident? The accident would not have happened without it. If the question were whether the accident was reasonably within the contemplation of the parties, I would say it was reasonably within the contemplation of the defendants, Hull & Co. They erected a hoarding which drove passengers on to the roadway. There ought to have been a footway. To protect them from what? What is the risk? The risk of being run down. "A wrongful or negligent act of Peter"—that is, of the defendants, who erected the hoarding—"may create a state of things giving an opportunity for another wrongful or negligent act of John"—that is, of the motor driver. "If harm is then caused by John's act, which act is of a kind that Peter might have reasonably

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foreseen, Peter and John may both be liable . . . One is not entitled to make obvious occasions for negligence." Now, that being so, and the jury having found—I will read the exact words of the finding—"Whether, if so, such negligence so directly conduced to the happening of the occurrence that but for such negligence the occurrence would not have happened?" Answer, "It did."

In the case of *Polemis* v. *Furness, Withy, & Co., Ltd.* (1), referred to by the Lord Chief Justice, a question arose as to the award of an arbitrator, and the arbitrator found that the damage could not have been reasonably anticipated from the act. There had been a long controversy between Beven and Pollock on the point as to whether it was enough if the thing did in fact happen from the negligence. The matter was finally settled in that case by the decision of the Court of Appeal, that, although the damage might not have been reasonably anticipated, nevertheless, if the negligence did in fact cause the accident, the party was liable.

Now I come to consider the statutes and the licence, having regard to this state of the law. The Public Health Acts Amendment Act, 1890, sect. 34, provides that every person intending to build or take down any building, or to alter or repair the outward part of any building in any street or court, shall—"(*a*) before beginning the same, unless the urban authority otherwise consent in writing, cause close-boarded hoards or fences, to the satisfaction of the urban authority, to be put up in order to separate the building from the street or court; (*b*) if the urban authority so require, make a convenient covered platform and hand-rail to serve as a footway for passengers outside of such hoard or fence . . ." It is therefore for the urban authority to decide whether the hoards, platform, and hand-rail are to be there or not. Now, we have in this case, as I will show when I come to read the licence, four stages of authority—1, the Corporation; 2, the Paving Committee of the Corporation; 3, the Borough Surveyor; and 4, the Assistant. The suggestion apparently is that the fourth of these, i.e., the Assistant of the Borough Surveyor, had lawful power to order the removal of the platform. But it is not the removal of the platform and hand-rail, but the maintenance of the hoarding without them, that caused the mischief, so that the argument comes to this—that a subordinate official has the right to authorize the keeping up of an obstruction which the Corporation had resolved was necessary.

The other statute is the Dublin Corporation Act, 1890. It provides that "It shall not be lawful for any person to erect or set up in any street any hoard, fence, or scaffold for any purpose whatever, or any posts, bars, rails, hoards, or other things by way of enclosure . . . without a licence in writing first had and

(1) [1921] 3 K. B. 560.

obtained from the Corporation, and every such licence shall state the place where such hoard, fence, or enclosure is to be set up or made, and the size thereof, and the time for which it is to be permitted to continue, and any condition to be observed by the grantee of the licence." It will be observed that all the powers are given to the urban authority itself.

I now take the licence. I have obtained, through the kindness of the solicitor, the original licence put in evidence in this case. It is a printed common form, and is headed and endorsed "Licence for Hoards, Scaffolds, or Fences." It is granted subject to the provisions of the statutes. It is obtained from the Corporation, and is signed "M. J. Buckley, Borough Surveyor." The conditions on which it is granted are set out in detail. The licence is granted "subject to the conditions hereinafter contained" to the licensee, and he signs the following undertaking: "I hereby accept the foregoing licence on the conditions above mentioned; and I agree, undertake, and bind myself to observe and fulfil them accordingly." These conditions have statutory authority. Let us now see what they are. The Borough Surveyor is mentioned. He signs it. The Paving Committee are mentioned. They are a committee of the Corporation. A discretion is given to the Borough Surveyor in certain cases. But there is no discretion given to a junior or assistant surveyor. Some of the conditions, it will be seen, are absolute; others give a discretion. The dates in this case are very remarkable if taken in conjunction with Condition 16 of the licence. That condition states that the licence is available for "a term of thirty-one days from the date of issue, but the Paving Committee may extend the same." The licence is dated the 3rd day of June, 1918, and the occurrence took place on the 4th February, 1921. So that there is power to vary the conditions of the licence, and that condition gives power to the Paving Committee to extend the term. Can it be contended that the Assistant Surveyor would have power to extend the licence? Take Condition No. 2: "The hoard, fence, or scaffold shall not extend beyond six feet from the front of buildings, nor outside the footway without the special permission of the Borough Surveyor." The Borough Surveyor has a discretion to allow that. But the second part of the same condition reads: "A portion of the existing footway, at least five feet in width, shall be left for traffic, or a timber platform of said width shall be substituted." Neither Paving Committee nor Borough Surveyor have any power over that provision.

Condition 3 provides that "The platform shall be firmly constructed of planks, spiked to joists, and shall have a pipe or channel through which a clear and sufficient waterway must be maintained. It shall also have a strong hand-rail, which, together with the platform, must extend the whole length of the works, and be returned at each end of the footway." No one has any power to vary that condition. Condition 4 is: "The

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hoard shall be firmly constructed of clean boards, properly braced; and the whole erection must be kept clean and free from spikes, splinters, or anything likely to occasion injury or inconvenience;" and Condition 5: "The public shall not be excluded from any portion of the footway until the platform, hoards, hand-rail, &c., shall have been placed to the satisfaction of the Borough Surveyor for the time being." But there is no power in the Borough Surveyor or any committee to vary the condition that a portion of the existing footway, at least five feet in width, or a substituted timber platform of the same width shall be left for traffic.

We have no evidence of any renewal of this licence, and it is brought into the case as evidence by the defendant. The jury therefore had before them that the Corporation thought it necessary that the public should not be excluded from the use of the footpath; that is to say, not compelled to take to the roadway until the artificial footpath had been substituted. Is it not absurd to suggest that, though it was bound to be put up, it might be taken away the next day? The jury have found that the defendants Hull & Co. were negligent "for removing hand-rail"—in other words, that they maintained a hoarding in the specific way prohibited. Mr. Justice M'Cardie agrees that "the breach of a statutory regulation will usually afford prima facie evidence of negligence." If we get the case that far, the negligence being the maintenance of this hoarding in the way prohibited, and we further know that the analysis of immediate or proximate cause of the event is only relevant where the defendant says the plaintiff suffered by his own negligence, I think the case is concluded. Moreover, one is not entitled to make obvious occasions for the negligence of another. Suffolk Street was stated to be some twenty-five feet wide at the place of the occurrence. If the platform and hand-rail had not been removed, the driver of the lorry looking up the street would see, as he approached, an obstruction projecting five feet into the roadway, making the roadway five feet narrower than the other portion of the street. This would naturally have made the driver cautious. But in this case he saw the full width of the roadway clear, and went on, with the result that the plaintiff suffered. For these reasons I am of opinion that the judgment of Mr. Justice Dodd was perfectly right, and that this appeal should be dismissed.

O'CONNOR L.J.:—

But for the opinions of my colleagues and of the trial Judge, I should have thought this a perfectly clear case.

Some time about June, 1918, the defendant, who is a builder, was employed to make some alterations in the house No. 23 Suffolk Street, on the south side of the street. For this purpose he put up the usual hoarding outside No. 23; the hoarding

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stretched across the entire footway; for a week or two after the hoarding was put up he kept erected the usual temporary footway running alongside the hoarding; the footway consisted of planking some five feet wide, with a hand-rail on its outer edge; after a week or two—in circumstances with which I shall deal later—this temporary footway was removed, and was never restored for several years, which the building operations required for their completion. During this period the naked hoarding reared itself over the ordinary footpath.

The plaintiff is a young lady who is engaged in offices on the north side of Suffolk Street. On the 4th February, 1921, in broad noonday, she was coming from Grafton Street to her offices. She proceeded along the footpath on the south side till she came to the hoarding. Now, she had to cross the street in any event, for her offices lay on the north side of the street. She had, therefore, two choices open to her. She might have crossed the street at right angles, or nearly at right angles, or, stepping off the footpath, she might proceed parallel to the hoarding, regain the southern footpath when she had passed the hoarding, and proceed to cross the street farther on. She took the latter course. Her doing so, in my opinion, imputes no blame or suspicion of negligence to her, though, as it seems to me, the logical result of my colleagues' decision is that she was guilty of negligence, as she voluntarily walked into what they seem to hold to be a dangerous place. Be that as it may, she continued her walk in safety until she had nearly passed the hoarding. At that moment a motor car was being driven along Suffolk Street in the same direction as that pursued by the plaintiff; it was driven negligently and skidded, careering violently towards the southern side of Suffolk Street, colliding with the plaintiff, apparently mounting the footpath, and finally coming to rest in a shop window on the southern side of the street past the hoarding. The plaintiff was seriously injured.

After the lapse of a considerable time — namely, on the 9th March, 1922—the plaintiff brought her action against the defendant; the action is one for negligence; her counsel abandoned, on the hearing of this appeal, any other form of action. The jury found in her favour, awarding her £2,700 damages. The question we have to consider is whether there was any reasonable evidence of negligence causing the accident.

I will put the case for the present against the defendant as high as it can be put. I will assume the hoarding was an entirely unlawful obstruction of the footpath; I will also leave out of consideration the facts that the plaintiff had to cross the street some time, and that it was only a coincidence that she was at the particular time on the particular part of the street which the motor car swept in its plunge into the shop window. The net question then is this: if a person unlawfully obstructs a footpath, and thereby compels persons walking along the footpath to take to the street, is he liable to any such person who is

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injured by the negligence of a person driving along the street? Does he warrant or insure such persons against injury from other persons' negligence?

It seems to me an astounding proposition, without principle or authority to support it.

What is the law in reference to the liability for damage alleged to be sustained through the wrongful act of another? It is as well settled as anything can be—the damage must be the "natural and probable," or, as later cases seem to prefer to put it, the "direct" result of the wrongful act (see judgment of Bankes L.J. in the *Polemis and Furness, Withy, & Co.* (1).

Is it, then, the "natural and probable" or the "direct" consequence of being obliged to walk upon the street that you will be run over? I emphatically think not. In these matters one has only one's common sense and experience for a guide (see Sir F. Pollock on Torts, 11th ed., pp. 35, 36); mine lead me to the conclusion that a happening of such a kind as the plaintiff complains of here is a most "unnatural" and "improbable" happening—in other words, that being on the street, as distinct from the footpath, has not "directly" caused the accident. There is, of course, a degree of danger everywhere; neither footpath nor street is immune; on the footpath there is the treacherous orange-peel, the aggressive umbrella or cane carried horizontally, the unexpected open grating, the whirling slate from the roof-tops; on the street the main danger, of course, is the vehicular traffic. Being on a footpath is not the direct cause of a slip on the orange-peel, a probe in the eye from the umbrella, a fall down a grating, a cracked skull from the slate. Neither is being on the street the direct cause of a collision with a vehicle negligently driven. The negligence is the cause; not the presence on the spot where the negligence is operative. Of course, I do not mean to suggest that there may not be more danger in the street than on the footpath. There are degrees of danger; some footpaths and some streets are more dangerous than others; but I do say that a street or a footpath is safe if people comport themselves properly and with care; that people are assumed to and mostly do so comport themselves; that want of care is the exceptional and not the ordinary incident of street traffic, for otherwise life in our cities would be intolerable. I suppose thousands of people must have walked along Suffolk Street without injury during the period this hoarding was there.

Is liability to attach where persons are forced off a footpath, for example, by a drunken man lying down upon it or swaying from side to side upon it, by the shopkeeper who incautiously leaves his grating open or his wares across the footway longer than is necessary, by persons walking abreast who impolitely refuse to make way for others? If not, why not?

Of course the case is quite different where a person by

(1) [1921] 2 K. B. 570.

obstructing a footpath, or for that matter any part of a highway, leaves the other part foundrous, unsafe, and inherently dangerous. Such a case is widely remote from the present.

I have so far gone upon the assumption that the obstruction was illegal. But, in truth and in fact, in my opinion it was nothing of the kind. The defendant complied, as it seems to me, with all the requirements of the highway authority, who directed him to take down the temporary footway. This, when the street is more or less narrow, is obviously common enough. Liffey Street, where I walk every day since our Courts were established in their present temporary abode, is an example; a hoarding, without any artificial footpath, has been there for a year or thereabouts at least. There are many places where the erection of the artificial footpath is impossible, owing to the tramway lines. I cannot assent to the proposition that the Corporation cannot, when the circumstances so require, exercise a reasonable discretion whether there shall be an artificial footway or not. What the defendant was to do I am at a loss to conceive; he obeyed the highway authority, acting through its responsible servant, and has been mulcted in £2,700 fine and the costs of an expensive litigation for his obedience; if he had refused to obey them, no doubt, the licence would have been withdrawn: the dilemma this presents is a burden and a terror to every builder and every citizen in the community. I may, however, say that, assuming a breach of the statute, and assuming that a breach might possibly give rise to an action for damages, what I have said as to the absence of direct causation in reference to remoteness of damage would equally apply to an action founded upon the statute; that claim, however, was abandoned before us.

I think the case should have been withdrawn from the jury, and that the appeal should be allowed.

Solicitors for the plaintiff: *Justin M'Carthy & Co.*
Solicitors for the defendant Stephens: *Gerald Byrne & Co.*
Solicitor for the defendants Hull & Co.: *R. N. Potterton.*

H. J. M'C.

[NOTE.—As reported in the Weekly Notes, 28th July, 1923, a petition for special leave to appeal from the above judgment was presented to the Judicial Committee of the Privy Council. The Judicial Committee (Viscount Haldane, Lord Buckmaster, and Lord Parmoor) dismissed the petition. Their Lordships intimated, however, during the argument that they would advise the granting of special leave in a case involving questions of public importance and of legal difficulty, such as would be treated by the Board as grounds for the granting of special leave in a case from one of the Dominions.—ED.]

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[House of Lords.]

MOTOR UNION INSURANCE CO., Appellants; BOGGAN, Respondent (1).

Insurance policy—Exceptions—Riot or civil commotion—Loss of motor car—Theft by armed men.

The respondent insured a motor car with the appellant company against loss or damage by fire, burglary, house-breaking, or theft. An exception in the policy provided that the insurers were not to be liable for "loss or damage arising during (unless it be proved by the insured that the loss or damage was not occasioned thereby), or in consequence of . . . riot, civil commotion, military, or usurped power." While the car was out on hire in Co. Wexford in November, 1920, the owner's chauffeur was held up by three or four armed men who blindfolded and removed him, and took away the car. The police had been called in from a few outlying stations; motor cars had been commandeered and not returned, and receipts given in three cases; a post-office motor cycle had been taken; there had been some raids for shot-guns and for mails; and early in January, 1921, martial law was proclaimed in the county.

Held, by the House of Lords (1), reversing the order of the High Court of Appeal for Ireland, which confirmed an order of the Court of Appeal in Southern Ireland (2), refusing to set aside the judgment awarded to the plaintiff by the Lord Chief Justice of Ireland, on 25th of November, 1921, that the Courts below should have drawn the inference, from the proved and admitted facts, that at the time of the seizure of the motor car there was both civil commotion and riot.

Per the Earl of Birkenhead: In dealing with a policy of insurance of a motor car, the relevant area within which one must ask whether or not there was disturbance or commotion, is that area over which a motor car, with reasonable compass and range, may be expected to travel. He inferred from the evidence that the car was taken by men working in the interest of those who were carrying out disorder, and engaged in violent courses in Ireland, and whose motive was not private gain. The circumstances were not those of a normal theft. There was an assumption of strength and of organization by the perpetrators who acted as masters of the situation.

Per Lord Wrenbury: All the elements of riot which were considered in *Field* v. *Receiver of Metropolitan Police* ([1907] 2 K. B. 853) were satisfied. The law was paralysed. The true meaning and scope of the policy was, as stated by O'Connor L.J., that where the arm of the ordinary law was paralysed by commotion or riot, the insurers were not to be liable for theft by armed men.

S. L. Brown K.C., *T. S. F. Battersby K.C.*, and *James Henry* (all of the Irish Bar), for the appellants.

E. A. Swayne K.C. and *St. L. E. Devitt* (both of the Irish Bar), for the respondent.

(1) Before Earl of Birkenhead, Lords Atkinson, Shaw of Dunfermline, Wrenbury, and Carson.

(2) [1922] 2 I. R. 184, 222.

Earl of Birkenhead (1):

My Lords, this is an appeal from an order of the High Court of Appeal for Ireland, dated the 27th of November, 1922, which confirmed an order of the Court of Appeal in Southern Ireland, dated the 17th July in the same year, refusing an application by the appellants that the judgment of the Lord Chief Justice for Ireland, delivered on the 25th of November, 1921, should be set aside.

My Lords, I regret myself, if only for sentimental reasons, that in probably what is one of the last appeals, if not the last, which will come to this House from Southern Ireland, it should be necessary for me to give a judgment which overrides the decision of so many Irish Judges; but having formed, as I have formed, a clear view upon the issues which are presented, it is necessary that I should state it.

The matter which falls to be decided arises from a policy of insurance which was effected by the respondent with the appellants upon a Ford motor car, of which he was the owner. The date of the expiry of the policy was the 12th of June, 1921, and the parts of the policy with which we are most closely concerned are the terms of exception (*c*). The exceptions are, of course, the cases which are not covered by this policy, and the relevant exception is in the following words: "Loss or damage arising during (unless it be proved by the insured that the loss or damage was not occasioned thereby) or in consequence of earthquake, war, invasion, riot, civil commotion, military or usurped power." Now the words, "unless it be proved by the insured that the loss or damage was not occasioned thereby," are enclosed within brackets, and may be dismissed with the observation that one is not to forget in construing this exception that the onus, as learned counsel for the respondent very properly pointed out, is upon the appellants here; and I bear that in mind in the observations I am about to make.

Having made that plain, let me re-read the exception, omitting those words: "Loss or damage arising in consequence of riot, civil commotion," &c. It is therefore necessary for the appellants here to satisfy your Lordships, as it was the obligation upon them to satisfy the Courts below, that this loss or damage was the result of a riot or civil commotion, or both. Let me address myself to the evidence upon this point. I am first of all bound to notice that the evidence of Meyler, the chauffeur, is that on the night of the 7th November, 1920, he was travelling at a good rate of speed near a place called Katescross when "three or four men appeared across the road, each of them armed with a revolver. They used some word which I could not catch. One came over and asked me where I was going to. I told him I was bringing the man alongside me to Duncormick. He told us

(1) The report of the judgments in the House of Lords has been printed from the shorthand notes of Messrs. W. B. Gurney & Sons.

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to get out of the car. He then brought us up the road about twenty or thirty yards. He told me he was taking the car from me. I was then blindfolded and brought across the land to an out-house. I was told to sit down. I was kept there three and a half to four hours. They took my permit. I was blindfolded again. They brought me to a different road and let me go. Two men stayed with me the entire time." I pause there to observe that the circumstances are not those of a normal theft; they differ in almost every important incident from what one would expect would happen in a case of an ordinary theft. In a case of ordinary theft of a motor car the thieves might be expected to remove themselves as quickly as possible from the scene of the theft; and there is in this case exactly what Lord Finlay commented upon in *Cooper's Case* (1): there is an assumption of strength and of organization which differs profoundly from the circumstances of an ordinary theft. I will quote the passage from the observations of Lord Finlay, which seems to me to be very much in point: "All these circumstances go to show that those who were engaged in this abstraction must have been acting with some force behind them, which made them feel they were masters of the situation; and it appears to me to be quite inconsistent with the idea that it was an ordinary motor thief who was guilty of the removal of this car."

My Lords, I have the same feeling about this case—that the manner in which the situation was handled by these armed men who took this car made it perfectly plain that in their judgment they had little to fear from the police or any other authority, and that they were, in Lord Finlay's phrase, the masters of the situation. Had *Cooper's Case* (1) not been decided by this House, I should have formed the same view in the present case which I have indicated now to your Lordships; but that any Court of final appeal which was bound by the authority of *Cooper's Case* (1) could reach in the present case a different conclusion would appear to me impossible.

Before I exhaust the evidence, I must make an observation upon what was stated by Sergeant White. The learned counsel for the respondent appeared, I thought rather surprisingly, to imagine that the evidence of Sergeant White afforded assistance to the argument which he was pressing upon your Lordships. I myself take the other view. I think that if Sergeant White had not been called, and had not given the evidence he did give, it would have been more difficult for the insurance company to discharge the onus that was imposed upon them. I think the plaintiff greatly assisted the insurance company by calling this particular witness. What did he say? In the first place, he had been a sergeant in the Royal Irish Constabulary for fourteen years: "On November 7, 1920, there was no serious disturbance in the county. The police had not at that time been called in,

(1) [1922] 2 I. R. 214.

except from a few outlying stations." It ought to be most carefully noticed that we are not exclusively concerned with the state of affairs at Wexford; we are dealing here with a motor car, and we must take the ambit and the known range of a motor car; and it is apparent that in dealing with a policy of insurance of a motor car the relevant area within which one must ask whether or not there was disturbance or commotion is that area over which a motor car with reasonable compass and range may be expected to travel. Applying oneself to that standard, what do we find? We find on the evidence of Sergeant White that they had actually called in the police from a few outlying stations, and stations outlying over a range which obviously could be compassed by an ordinary motor car. Why were the police withdrawn from the outlying stations? The learned counsel suggested that it might have been through exaggerated or alarmist apprehensions, or even premature apprehensions. We must not draw any such inference. We must assume that that grave step, which was taken by the constituted police authority, of withdrawing the police from the barracks and outlying stations, was because they had reached the conclusion that the police were not safe in those stations; and if it was a fact that the police had formed the view that in some, even a few, outlying stations the representatives of law and order were not safe because they were liable to be attacked, we derive therefrom a very clear view of the state of this particular district.

The sergeant continued: "There was no martial law till the 4th January, 1921." In fact, it is a circumstance not without significance, I think, that about seven or eight weeks after the events on this particular day martial law was proclaimed—a period which corresponds very closely with the interval which existed in *Cooper's Case* (1) between the theft and the proclamation. He adds: "On a few occasions . . . about four cars had been commandeered and not returned, and receipts given in three cases."

Now, my Lords, I am bound to take note of what was said by Lord Cave and Lord Finlay in *Cooper's Case* (1); they took judicial notice of the fact that in the kind of disorders which were prevalent in Ireland at that date motor cars were extremely useful, and on many occasions had been in fact commandeered. I observe what was said by the noble and learned Lords who gave judgment in that case, and applying that knowledge—I am bound to take it from them—I say here that we have the evidence of the police that in four other cases cars had been commandeered; and I ask what is the right inference to draw from the proved facts in this case? I can only draw one inference: that this was a case in which the car was taken by men who were working and who were purporting to work in the interests of those who were carrying out disorder, and were engaged in

(1) [1922] 2 I. R. 214.

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violent courses in Ireland, and whose motive was not the motive of private gain. We are not concerned closely to inquire as to whether we are to see in the act which was done a case of civil commotion, or whether we are to see a case of riot, although, if I were myself bound to reach a conclusion on this point, I should say that in my judgment it was both civil commotion and riot. That it was civil commotion is, in my judgment, established by those parts of the evidence to which I have directed attention, and I am unable to agree with the view pressed upon me by learned counsel for the respondent that in order to constitute those ingredients which in law amount to riot it is necessary that there should be noise. It is a doctrine that is, I confess, novel to me. I should agree with the learned counsel if he had said that in nearly all cases where there is a riot it is also found that there is noise and disturbance and tumult; and it is, no doubt, because the ordinary habit of men who behave riotously is also to behave noisily that this confusion has arisen. But the absurdity of accepting a definition of riot which would exclude from its scope a body of twenty or thirty men who did every other act which would constitute a riot, except that of making a noise, is too manifest to require any labouring at my hands.

Being, therefore, of opinion that the Courts below should have drawn the inference from the proved and admitted facts that there were here both civil commotion and riot, I am of opinion that the appellants in the present case discharged the onus which the exception imposed upon them, and that this appeal ought to be allowed with costs; and I so move your Lordships.

LORD ATKINSON: My Lords, I concur.

LORD WRENBURY:

My Lords, John White, sergeant in the Royal Irish Constabulary, was a witness called by the plaintiffs, the motor car owners. Having regard to that fact, I am able from his evidence, and the inferences which I draw from it, to arrive very clearly at the conclusion that there were here riot and civil commotion. He says: "There was no serious disturbance in the county." From that I infer that there was disturbance, although he is not prepared to go so far as to say it was serious. He says: "The police had not at that time been called in, except from a few outlying stations;" from which I am entitled to infer that they had been called in from stations, and that the stations from which they were called in were outlying stations, meaning, as I infer, stations at which they were not under sufficient protection from attack, if attack were made upon them. He says further: "On a few occasions—about four—cars had been commandeered and not returned, and receipts given in three cases." Now, a motor car, as we know, in the circumstances which prevailed in Ireland, was a thing which might very well be used for the purpose of revolutionaries. In his district—

because it must have been his district of which he was speaking—four cars had been commandeered; so that four cars had been taken, as I infer, for the purpose of assisting revolutionaries. And I am assisted in that by this fact, that receipts had been given in three cases. Now, a motor car thief does not generally give a receipt. The object of giving a receipt, no doubt, was that the person who seized the car was saying in substance, "I am not a motor car thief; I am responsible for the car which I have taken, and I give this to you as a proof that it has been taken away from you by superior force." He says further: "There had been some raids for sporting guns and for mails." Now, this again must have been within his district—that is to say, that within this district sporting guns, which we all know were taken for the purpose of using them for military purposes, had been taken, and that mails had been seized. To my mind that is the clearest evidence of a state of disorder in this county, and it seems to be of disorder which amounts to civil commotion.

Well, further, what do we know upon the head of riot? The facts as we know them are these: a man is driving a motor car along a country road, and he is stopped by four men with revolvers—that is a violent act; in these circumstances he is stopped; he is told to get out of the car; he is brought up the road about twenty or thirty yards, blindfolded, and detained for some two hours while they drive the car away. Ultimately they release him. The relevancy of blindfolding him, if there is any particular relevancy in it, I think is this: it was intended to assist them in concealing the identity of the persons who were commandeering the car. They were taking him to a house; they did not want him to know what house he was taken to, because that might have been a means of tracing the men. This was a surreptitious taking of the car, as it appears to me, for purposes which were revolutionary purposes.

It has been argued that there can be no riot unless there is tumult—unless there is noise; unless there is violence, and rapid movement, or something of the kind. I do not assent. It appears to me that in this case all the elements of riot which were considered in the case of *Field* v. *The Receiver of Metropolitan Police* (1) were satisfied. There were more than three persons; they had a common object; they had an intent to help one another; they had each of them revolvers, which they were going to use if necessary; they used force or violence, potentially at any rate if not actually, because it was not necessary to use it, but they threatened force or violence; and I have no doubt that it was done in such a manner as to cause alarm to the man who was blindfolded and kept a couple of hours in a cottage while they were getting away.

It appears to me that, as regards the construction of this policy, Lord Justice O'Connor was well founded in that which

(1) [1907] 1 K.B. 853.

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he said. He said: "I am of opinion that the true meaning and scope of this policy is that where the arm of the ordinary law is paralysed by commotion, disturbance, or riot, the insurers are not liable for theft by armed men." I think that is well founded, and I think it is shown here that these men knew that the law was incapable in the circumstances of interfering with them, and that the law was paralysed, and there was a state of civil commotion, disturbance, or riot.

I have been, I confess, a good deal disturbed by the fact that although, as I understand from the respondent's counsel, there are six judgments of learned Judges in the Courts of Ireland given in his favour — judgments supported, I suppose, by reasoning—no one of those judgments has been read. Notwithstanding my invitation to the respondent's counsel to read them, or so much of them as is necessary to put me in possession of the reasoning of those learned Judges, he has elected not to read them. Lord Birkenhead has said that he has looked through these judgments, and that their reasoning has been put by counsel in the course of the argument. I should have been better satisfied myself if I had heard what those learned Judges had to say, in order to see whether the language which they used and the opinions which they expressed would modify in any way the opinion I have formed.

My Lords, I think the appeal succeeds.

LORD CARSON:

My Lords, I concur. I would be quite satisfied to base my judgment upon the reasons given by the dissenting Judge, Lord Justice O'Connor; and when I recollect that since that decision was given we have had the decision of your Lordships' House in *Cooper's Case* (1), I think this matter is put beyond all doubt.

Questions put.

That the order appealed from be reversed.

The Contents have it.

That judgment be entered for the appellants, and that the respondent do pay to the appellants their costs both here and below.

The Contents have it.

Mr. S. L. Brown: My Lords, may I, on the question of costs, say this. This is a very small case, but the insurance company were obliged to bring it here, and go through all this expensive litigation, because over three hundred other cases depend upon it. In the circumstances, it would be a hardship upon the respondent here if he were obliged to pay the costs; and I am instructed to say that the insurance company will not ask for costs either in your Lordships' House or in the Courts below.

EARL OF BIRKENHEAD: I am sure that will be a relief to the respondent.

(1) [1922] 2 I. R. 214.

IN THE MATTER OF THE ESTATE DUTY PAYABLE ON THE PROPERTY PASSING ON THE DEATH OF GEORGIANA DUNBAR-BULLER (1).

Appeal. (*N. I.*) 1922.

Nov. 2.

1923.

Feb. 7.

(1922. No. 1.)

Revenue—Estate Duty—Rate of duty—57 & 58 *Vict. c.* 30, *s.* 4; 63 *Vict. c.* 7, *s.* 12, *sub-s.* 2; 7 *Edw.* 7, *c.* 13, *s.* 16—*Aggregation of properties—Settled property—Tenant for life exercising general power of appointment.*

D. died in 1875 leaving a will whereby he settled certain estates to the use of B. for life, remainder to the use of her children, remainder to such uses as B. should by will or codicil expressly referring to the power in the will appoint, and in default of appointment by B. to the use of H. for life, with remainders over. B. died without issue in 1920, leaving a will in which she expressly referred to and exercised the power of appointment given by the will of D.

Held, reversing the judgment of Wilson J. ([1922] 2 I.R. 204), that the power, having regard to the conditions prescribed for its execution, was special and not general, that for the purpose of determining the rate of estate duty payable on the property passing on the death of B. the claim to aggregate the property over which B. had power of appointment with the other property passing on her death failed, and that the estate was "settled estate" within the meaning of 63 Vict. c. 7, s. 12, sub-s. 2.

APPEAL by the petitioners from the judgment of Wilson J., dated June 28th, 1922 (reported [1922] 2 I.R. 204), where the facts are stated.

The petitioners appealed to the Court of Appeal of Northern Ireland from the judgment of Wilson J.

Robb K.C. and *Pringle K.C.*, for the petitioners.

Megaw K.C. and *Davison*, for the Ministry of Finance.

The arguments were similar to those urged before Wilson J. The authorities cited are referred to in the judgments.

MOORE L.J.:—

George Dunbar, late of Woburn, who died on 12th August, 1875, by his will of September 26th, 1872, settled certain estates on his daughter (who afterwards became Mrs. Georgiana Dunbar-Buller) for her life, with remainder to her sons and daughters as thereby provided, with remainder to such uses as she (the daughter) should by will or codicil expressly referring to the power under the will in recital appoint, with further limitations over in default of appointment, the next of which was to the Rev. William Haughton for life.

Mrs. Dunbar-Buller having no children, exercised by her last

(1) Before MOORE and ANDREWS L.JJ.

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will the power of appointment in favour of her husband, Charles William Dunbar-Buller, one of the petitioners, for his life, with remainders over dealing with the Woburn, Dock, and Lodge estates, the Belfast and Ballymacarrett estates. She died on 26th March, 1920. In these circumstances, the question for us is whether the property so appointed was settled property passing on the death of the deceased, Mrs. Dunbar-Buller, under a disposition made by a person (George Dunbar) who died before the commencement of the Finance Act, 1894. If it is, the claim of the Finance Minister to have same aggregated with the other property of Mrs. Dunbar-Buller fails. Is Mr. Dunbar-Buller, in whose favour his wife has exercised the power, to be deemed to take his late father-in-law's property under his will, or does he take the same property under his wife's will by virtue of her exercise of the power of appointment? Powers are divided into two kinds: general or unlimited and special or limited. In endeavouring to ascertain under what category a power may be placed, it is usual to apply the test of looking at the objects to be benefited. Lord Selborne, in *Charlton* v. *Attorney-General* (1), says: "It is true that the distinction between general and limited powers in the common language of English law relates not to conditions affecting the donees of a power or otherwise antecedent to an appointment, but to the nature of the appointment which may be made under the power." Judged by this standard in the present case, the power given to Mrs. Dunbar-Buller would be regarded as a general power, because the donee of the power had an uncontrolled choice in the objects she might desire to benefit by exercise of it. But it seems to me on the decisions that the foregoing test is not exhaustive, and that powers limited or controlled as to the manner of execution, such as in the present case (in which a reference to the instrument creating the power is necessary for proper exercise of the power), are not to be taken as general powers for the purposes of sect. 27 of the Wills Act: see Farwell on Powers, 3rd ed., 1916, at p. 257; *Phillips* v. *Cayley* (2). *Phillips* v. *Cayley* (2) was a decision of the Court of Appeal affirming Kekewich J., declining to follow North J., who decided *In re Marsh* (3) to the opposite effect. North J., however, followed *Phillips* v. *Cayley* (2) in *Davies* v. *Davies* (4). I cannot find that it has since been questioned. It was apparently followed in *Tarrant's Trusts* (5), but I have had no opportunity of consulting the report of that case. It follows that the power of appointment exercisable by the will of Mrs. Dunbar-Buller is not a general power under sect. 27 of the Wills Act. I am of opinion that if for purposes of that section, which embodies a rule of construction, the power is to be taken as limited, we should look on it as limited also for the purposes I will next discuss.

(1) L. R. 4 A. C. 446.
(2) 43 Ch. Div. 222.
(3) 38 Ch. Div. 630.
(4) [1892] 3 Ch. 632.
(5) 58 L. J. Ch. 780.

The rule of law appears to be that while general powers are for many purposes treated as the actual disposition under which property thereby appointed passes, limited powers, at any rate when exercised, are construed as part of the settlement under which the limited power has been created. So the Court of Appeal in *Gordon and Adams' Contract* (1), referred to by Wilson J.: "A special power must be read into the instrument creating it." So, too, Hanson, Death Duties, 6th ed., at p. 483: "Where the power is a limited power authorizing an appointment in favour of a particular person, the ordinary rule of law applies; and if the power were originally created by will, a gift in exercise of it is made under that will, and not under any other." *Attorney-General* v. *Pickard* (2) is referred to, which was a case under the Legacy Duty Act of 1796. This made legacy duty payable under the will creating the power to jointure, not under the subsequent exercise of the power (also by will) creating the jointure. In *Sweeting* v. *Sweeting* (3), where the power to charge was created by will but exercised by deed under the power, Kindersley V.-C. held that legacy duty was payable as on a gift under the will. *Braybrook* v. *Attorney-General* (4) was a case under the Succession Duty Act, and it was held that the execution of the power of appointment must be referred to the deed creating it. In *Chapman's Case* (5), to which we have been referred, the exercise of a general power of appointment was held to pass property, not by virtue of its own operation, but under the settlement creating the power, for the purposes of the Customs and Inland Revenue Act, 1881. In *Magan's Case* (6) Palles C.B. and Kenny J. held that for purposes of estate duty the property passed under the testamentary settlement creating the power, and not by the subsequent will exercising the power. The power resembled the power in the present case, but no argument seems to have taken place on the point as to its being a general or a limited power, and judgment went for the Crown on another ground. In all these cases, except *Magan's Case* (6), though, of course, under differing statutes, it will be noted that the Revenue have claimed to throw back the incidence of the duties from the exercise of the power to the original settlement. In the present case the argument is the opposite. If the statute permits, which I think it does, we should act in conformity with this long line of decisions in these Revenue cases, where, apart from special words in each statute, the general principles of law are the same; and I therefore hold that the property passed to the petitioner, C. D. Buller, under the disposition in the will of George Dunbar, and not under the will of his late wife, and therefore the claim of the Department to aggregation fails.

It only remains for us to decide whether or not at the moment of Mrs. Dunbar-Buller's death the estate was "settled" estate.

(1) [1914] 1 Ch. 110.
(2) 3 M. & W. 552; 6 M. & W. 348.
(3) 1st Drew, 331.
(4) 9 H. L. C. 150.
(5) [1891] 2 Q. B. 526.
(6) [1922] 2 I. R. 208.

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I think the facts in this case distinguish it from *Magan's Case* (1). The Chief Baron says, p. 210: "Up to the moment of the death of Miss Augusta Magan the property, in my view, was 'settled' within the meaning of the Finance Act. But at the moment of her death the possibility of her having issue ceased; at that time and from that moment no one could take under the mother's will save Miss Magan herself; and therefore I hold that upon and from the moment of her death the property ceased to answer the description of being settled." He then proceeds to deal with the priority inter se of the act of death and the effect of the appointment. But in the present case, at the moment of Mrs. Dunbar-Buller's death, if only for the instant, the Rev. William Haughton, the immediate tenant for life in remainder, took under the settlement of George Dunbar, or perhaps I should say was a person designated by the settlement in existence to take, as successor. The will of Mrs. Dunbar-Buller speaks from the death; and if I am correctly following Palles C.B. in holding that there is priority of time for acts done at the same instant, then on the death and before the appointment took effect there was a settled estate, with a named tenant for life in esse and remainders over. This in my judgment constituted "a succession," and was sufficient to form a settled estate within the meaning of the Finance Act.

I think the relief sought by the petition should be granted, the appeal allowed, the order of Mr. Justice Wilson reversed with costs in this Court and in the Court below.

ANDREWS L.J.:—

In the case of every person dying after the commencement of Part I of the Finance Act, 1894, estate duty is, with certain exceptions, which are not material for the present case, leviable upon the principal value of all property which passes on the death: sect. 1; and for determining the rate of estate duty to be paid on any property passing on the death it is provided by sect. 4 of the Act that all property so passing in respect of which estate duty is leviable must be aggregated so as to form one estate. This aggregation section was somewhat modified by sect. 12, sub-s. 2, of the Finance Act, 1900, by which it was enacted that where settled property passes or is deemed to pass on the death of a person dying after the passing of that Act under a disposition made by a person dying before the commencement of Part I of the Act of 1894, and such party would, if the disponer had died after the commencement of the said part, have been liable to estate duty upon his death, the aggregation of such property with other property passing upon the first-mentioned death shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one-half per cent. in excess of

(1) [1922] 2 I. R. 208.

the rate at which duty would have been payable if such settled property had been treated as an estate by itself. This latter clause was in turn amended by sect. 16 of the Finance Act, 1907 (7 Edw. 7, c. 13), which enacts that in the case of persons dying on or after 19th April, 1907, any settled property which would under sect. 12, sub-s. 2, of the Finance Act, 1900, be aggregated with other property so as to enhance the rate of duty to the limited extent provided in that section, shall, for the purposes of the Finance Act, 1894, instead of being so aggregated, be treated as an estate by itself.

The petitioners, who are the executors and trustees of the will of the late Mrs. Georgiana Anne Elizabeth Dunbar-Buller, contend that the assessment which has been made by the Ministry of Finance upon the estate duty accounts furnished in respect of the death of the said Mrs. Georgiana Dunbar-Buller was erroneous in so far as it claimed that the properties settled by the will of her father, George Dunbar, and over which she had, as alleged, a general power of appointment, ought to be aggregated with the other property passing on her death for the purpose of determining the rate at which estate duty is payable.

The material facts and documents have been referred to by Moore L.J., and a brief summary will suffice for the purposes of this judgment. Certain freehold estates in Ireland, the property of the said George Dunbar, were by his will, dated 26th September, 1872, settled, in the events which have happened, to the use of his said daughter Georgiana for her life, and after her death to the use of her first and other sons in tail male, with remainder to the use of her daughters as therein mentioned, with remainder to such uses upon such trusts and with, under, and subject to such powers, provisoes, and declarations as Georgiana should by will or codicil expressly referring to the power, appoint; and in default of appointment to the use of the Rev. William Haughton for life, with remainders over, including an ultimate remainder to his, the testator's, own right heirs for ever. The devise was made subject to a certain charge, to which, however, it is unnecessary to make further reference, as, in the events which have happened, the sum so charged had, prior to her death, become absolutely vested in his said daughter Georgiana. She died without having had any issue on 26th March, 1920.

Her will, dated 24th January, 1907, after reciting the relevant portions of the will of her father above referred to, contains a release and discharge of the hereditaments charged therewith from any portion of the sum charged thereon which might remain unrealized at her death. The testatrix further, in express exercise of the power of appointment given to her by her father's will, appointed the several freehold estates in Ireland upon certain trusts therein specified.

The question which we have to determine is whether in these circumstances these freehold estates passed or are deemed to pass on the death of Georgiana as settled property under the will

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of her father, who died prior to 1894, or whether, on the other hand, they passed under her own will. If the former be the correct view, then these settled properties must, under the provisions of the Finance Acts of 1900 and 1907 referred to, be treated as estates by themselves. If the latter view be sound, these properties must be aggregated with the other property passing on the death of Mrs. Georgiana Dunbar-Buller, with a consequent increase in the rate of estate duty payable thereon.

In answering this question, regard must particularly be had to the character of the power and the nature of the appointment. There has long been recognized to be an important distinction between general and particular powers. The donee of a general power is in effect absolute owner of the property in respect of which the power is conferred, whereas the donee of a special power is not. This distinction has frequently been referred to in considering the application of the rule against perpetuities; for, whilst the donee of a general power is recognized for the purpose of this rule as absolute owner of the property, the donee of a special power cannot appoint to any person to whom the original creator of the power could not have appointed. As stated in Sugden on Powers, 8th ed., pp. 395-6, the test of the validity of the estates raised under a particular power is to place them in the deed creating the power in lieu of the power itself.

This rule or principle, that when a particular power is executed the limitations created under it must be written into and so read in the instrument which created the power, is clearly enunciated by Buckley L.J. in the case of *In re Fane, Fane* v. *Fane* (1), where he says: "General powers are exempt from the restrictions of the rule against perpetuities, because the existence of a general power leaves the property in a position which for the present purpose does not differ from that in which it would stand if there were an absolute owner. There exists by the existence of the power a present, immediate, and unrestrained alienability, and there is no necessity to consider in such case how far a perpetuity may be created any more than it is necessary to consider it in the case of an absolute owner. Particular or special powers, such as a power to appoint among a named class of persons, differ from general powers in that the donee has not an unrestricted power of alienation, and in that case the rule against perpetuities requires that all limitations made in pursuance of the power shall be such only as would have been valid if inserted in the original will or settlement: Sugden on Powers, 8th ed., p. 396. When the power is exercised, the limitations created under it are to be written into the instrument which created the power; and if and so far as they do not exceed the rule against perpetuities, they are good."

The application of this "reading in" rule has not been, however, confined in practice to cases in which the validity of gifts

(1) [1913] 1 Ch. 404, at pp. 413, 414.

has been challenged on the ground that they infringe the rule against perpetuities. Thus, though a husband was unable, prior to the Conveyancing Act, 1881, sect. 50, to make a conveyance to his wife, he could exercise a power of appointment to take immediate effect in her favour, because in such a case the wife's estate arose, not out of the husband's estate, but out of the seisin under the original instrument creating the power. Likewise, although the rule in *Shelley's Case* (1) requires that the prior estate of freehold and the subsequent limitations must be contained in the same instrument, yet a limitation to A for life by deed, with a subsequent appointment during A's life to the heirs of A, made in exercise of a power of appointment contained in the deed creating A's life estate, falls within the rule in *Shelley's Case* (1) so as to give A a fee-simple; for, when the appointment to A's heirs is read into the instrument creating the power, both the life estate of A and the subsequent limitation to his heirs are contained in the same instrument: *Venables* v. *Morris* (2). Finally, the rule to which I have referred was stated and reaffirmed by Cozens Hardy M.R. in the passage cited by Wilson J. in his judgment in the recent case of *In re Gordon and Adams' Contract* (3), heard upon a vendor and purchaser summons, and in which the point is also emphasized that for the application of the rule to general powers it is vital that there should be no interest under the will of the testator still subsisting in the form of a jointure, portion charge, or other prior estate, for, if there were any such, the trusts of the original settlement would not be spent and exhausted.

The question, therefore, which it is in my opinion necessary for us to determine is whether the power created by the will of George Dunbar is general or particular within the true meaning of these words as used in the above-mentioned "reading in" rule. In determining this question we are not, in my opinion, without authority to guide us. In *Phillips* v. *Cayley* (4) trustees under an indenture of settlement were to stand possessed of a sum of railway stock for such persons as the settlor should by writing under his hand, not being a will or codicil, or by a will or codicil expressly referring to the power, appoint. The settlor by will bequeathed his personal estate to trustees, not making any reference to the power. The Court of Appeal, affirming Kekewich J., held that this bequest did not operate under sect. 27 of the Wills Act as an execution of the power, for the power could not be regarded as a general one within the section; or, in other words, was not a power to appoint in any manner which the testator might think proper, since one class of writings, namely, testamentary writings, in which the power is not expressly referred to, were excluded from the exercise of the power. The same point had been determined in the same way a few

(1) 1 Rep. 93*b*.
(2) 7 T. R. 342, 438.
(3) [1914] 1 Ch. 110.
(4) 43 Ch. D. 222.

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months previously by Chitty J. in *In re Phillips, Robinson* v. *Burke* (1); and the authority of these decisions is in no way questioned by the cases of *In re Waterhouse* (2), *In re Rolt* (3), or *In re Lane* (4), in which the powers were expressed in somewhat similar terms.

But it is urged on behalf of the Crown that such cases as *Phillips* v. *Cayley* (5) are not conclusive in the present case, as they only decide that a power such as that which we have to consider is not a general power within sect. 27 of the Wills Act. It may be, they contend, a general power for the purpose of the "reading in" rule. There is, in my opinion, no substance in the distinction which it is thus attempted to draw. In my opinion there could be no better definition of a general power for the purposes of the "reading in" rule than the words of sect. 27: "a power to appoint in any manner he, the donee, may think proper." Let us consider the matter briefly both on principle and authority. What is the foundation of the "reading in" rule? Why does the law say that in certain cases appointments should be read into the instrument creating the power, whilst in other cases they should not? The answer, as it seems to me, is that in certain cases the instrument creating the power contains internal evidence of the intention of the settlor that the appointee should derive title direct from him, whilst in other cases there is no such evidence. One case in which such evidence exists is where the appointees or objects of the power are referred to either by individual names or as members of a class. This is, perhaps, the more usual form of special power. But there is another case in which such evidence is to my mind equally apparent, and it is well illustrated by the terms of the power with which we have to deal in the present case—namely, where, though the objects of the power are perfectly general, the settlor says in effect to the donee of the power, "You can give the property by your will to any person or persons whom you please, but you can only do so if, in exercising the power, you make what amounts in law to an express reference to the power; for, if this be done, it will bring me into close contact with the gift, and the appointee's title will be derived directly from me." It seems to me that common-sense tells one that this is an obvious case for the application of the "reading in" rule.

Turning again to the authorities, there are two other cases which were cited to us in argument, and to which I find it necessary to refer at some length, as, if properly decided, they appear to me in effect to govern the present case. The questions arose in both cases on Acts of Parliament imposing duties on the subject. The first of these is the *Attorney-General* v. *Chapman and Another* (6). By 44 & 45 Vict. c. 12, sect. 38, stamp duties

(1) 41 Ch. D. 417.
(2) 96 L. T. 688 and 98 L. T. 30.
(3) [1908] W. N. 76.
(4) [1908] 2 Ch. 581.
(5) 43 Ch. D. 222.
(6) [1891] 2 Q. B. 526.

were imposed in respect of accounts delivered of personal property, including any property "passing under past or future voluntary settlement," made by any person dying on or after June 1st, 1881, by deed or any other instrument not taking effect as a will whereby an interest in such property for life was reserved to the settlor; and by 52 & 53 Vict. c. 7, sect. 11, the expression "voluntary settlement" includes any trust in favour of a volunteer, whether the deed or instrument effecting the settlement was made for valuable consideration or not as between the settlor and any other person. By a settlement made in consideration of marriage, H. transferred personal property to trustees upon trust to pay the income to herself for life; and, if certain events should happen, after her death upon trust for such person or persons as she, notwithstanding coverture, might appoint. The events happened, and H. died in 1888, having during her coverture by deed exercised the power of appointment in favour of a niece. It was held that the property so appointed to the niece must be taken to be property passing under the marriage settlement; that the settlement and deed of appointment constituted a voluntary settlement whereby a life interest was reserved to the vendor within the meaning of sect. 38 of 44 & 45 Vict. c. 12, and therefore that duty was payable in respect of such property.

It will be observed that the decision in this case of the *Attorney-General* v. *Chapman* (1) goes somewhat further than any of the other cases to which I have referred, for, although the power under which the appointment was made was a general one, the appointment was read into the instrument which created it. The judgment of Wills J. was, however, largely based upon and may be fully explained by the use of the words "passing under" in sect. 38 of 44 & 45 Vict. c. 12, above referred to. If so, the importance of the case is for our present purposes largely increased, as this phraseology is identical with that employed in sect. 12, sub-s. 2, of the Finance Act, 1900, which we are called upon to construe. It will be observed that in *Chapman's Case* (1) it was the interest of the Crown to put forward a contention precisely contrary to that which they have submitted to us. They succeeded then. Should they also succeed now? Wills J. said that the expression "passed under" is not a phrase of art, but a phrase of a comprehensive nature, which he thought might fairly be used in respect not only of dispositions effected by the words of the instrument creating them, but of those which were effected by the subsequent execution of a power created by the instrument in question. Property, the right to direct the application of which is created by deed A., but the specific direction of which is effected by deed B., passes under, not by, deed A. The same wide meaning which has invariably been attached in judicial interpretation to the word "passes" will be found in the

(1) [1891] 2 Q. B. 526.

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Andrews L.J.

speech of Lord Sumner in *O'Grady* v. *Wilmot* (1). The other case, *In re Augusta Magan* (2), was decided by Palles C.B. and Kenny J., on 15th May, 1908, and is reported as a note to the proceedings in this case before Wilson J. in [1922] 2 I.R., at p. 208. It is a case of even greater importance to us than *Chapman's Case* (3), as it was decided on precisely the same sections of the Finance Acts as we are called upon to consider in the present case. The question to be determined was whether in ascertaining the estate duty payable on the death of Miss Augusta E. Magan, who died on 26th October, 1905, the property, which was subject to a general power of appointment contained in the will of her mother, Mrs. Elizabeth Georgiana Magan, of which she was the donee, should, under sect. 4 of the Finance Act, 1894, be aggregated with the individual property of the deceased. Miss Augusta Magan had, it must be noted, at the time of the execution of her will, both a power of appointment over the property in question contingent upon there being a failure of her issue, and also in the same event, subject to her life estate, the remainder in fee in the realty and the absolute interest in the personalty. She concluded her will with the words: "I make this will in pursuance of the power contained in my mother's will, and of all other powers and authorities whatsoever." The Court, relying largely upon a passage quoted from Sugden on Powers, decided that in the circumstances the estate passed under the power, not under the devise; and accordingly again held that, even though the power was general in terms, the appointment must be read into the settlement created by the mother's will, and that it passed under her will, and so defeated the aggregation section.

Wilson J. endeavours to explain away this decision by suggesting as its justification the existence of some antecedent estate or incumbrance, such as Elder's annuity created by the mother's will. No doubt such an annuity existed, but it would in my opinion be quite incorrect to say that the decision was based on any such ground. The ratio decidendi obviously was that, as Miss Magan purported to limit the estates according to the power, they took effect by virtue of the provisions of her mother's will, which created the power, and that her own will was but declaratory.

I am not prepared to dissent from the views expressed by the eminent Judges who decided these two last cited cases; and I accordingly hold that the freehold estates in Ireland formerly the property of George Dunbar passed on the death of his daughter Georgiana under his will, which was in my opinion "a disposition made by a person dying before the commencement of Part I of the Act of 1894," within the meaning of sect. 12, sub-s. 2, of the Finance Act, 1900.

In these circumstances the only other point which remains to be determined is whether the property in question was "settled

(1) [1916] 2 A. C. 231, at p. 268. (2) [1922] 2 I. R., at p. 208.
(3) [1891] 2 Q. B. 526.

property'' as required by such last-mentioned section. Mr. Robb, for the trustees, has very fairly and properly admitted that the property must be settled at the time that it passes. Now, what is ''settled property''? The expression is defined in sect. 22 (h) of the Finance Act, 1894, as meaning property comprised in a settlement; and by sect. 22 (i) ''settlement'' is defined as meaning any instrument, whether relating to real property or personal property, which is a settlement within the meaning of sect. 2 of the Settled Land Act, 1882. By such last-mentioned section it is provided that any deed, will . . . or other instrument, or any number of instruments . . . under or by virtue of which instrument or instruments any land or any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of the said Act a settlement. A plurality of persons who may become entitled in succession to the property is therefore an essential to the property being ''settled'' within the meaning of sect. 12, sub-s. 2, of the Finance Act, 1900. This is the view expressed by Stirling L.J. in *In re Pocock and Prankerd's Contract* (1), which was approved of by Palles C.B. in *In re Magan* (2).

Magan's Case (2) is relied upon by the Crown as an authority in support of their contention that on the death of Georgiana without issue the property had ceased to be ''settled.'' The cases are in this respect clearly distinguishable from one another. When Miss Augusta E. Magan died without issue the property, which had up till then been settled because of the possibility of her having issue, ceased to be such, for from that moment no person could take under her mother's will save Miss Magan herself. The necessary plurality of persons who might become entitled to the property in succession did not exist. On the other hand, when Mrs. Georgiana Dunbar-Buller died without issue the property did not cease to be settled, for had she not exercised the power of appointment conferred upon her by her father's will the property would have passed under his will to the Rev. William Haughton for life, with remainders over as in said will mentioned. In law Mrs. Georgiana Dunbar-Buller's death preceded the passing of the property, though both in point of time occurred at the same moment. The property never was unsettled, for during that infinitesimally small period of time which must be deemed to have elapsed between the death and the appointment coming into operation the Haughton trusts were in being, and would have continued had no such appointment been made.

For these reasons I am of opinion that the contention of the Crown has failed, that the judgment of Mr. Justice Wilson must be reversed, and the prayer of the petition granted with costs.

Solicitors for the petitioners: *Crawford & Lockhart.*
Solicitor for the Ministry of Finance: *J. H. B. Gunning.*

J. M'C.

(1) [1896] 1 Ch. 302.

(2) [1922] 2 I. R. 208, at p. 210.

K. B. Div.
(I. F. S.)
1923.

May 14.

JOSEPH MANSERGH PALMER *v.* EMILY PALMER AND OTHERS (1).

Practice—Writ—Endorsement—Amendment—Special Endorsement—Action for recovery of land—Agricultural or pastoral holding—R.S.C. (Ir.), 1905, Order 3, rule 7.

In an action for the recovery of possession of a holding within Order 3, rule 7, the plaintiff issued a writ which was not in the form prescribed by that rule. He afterwards applied for leave to amend the writ by adding such words as would make the endorsement a special endorsement within the rule. The application was refused.

The plaintiff, on the 17th June, issued a writ to recover possession of certain lands in the Queen's County for non-payment of the rent thereof, and in the particulars it was stated that there were eleven and a half years' rent due. The writ also asked for judgment for the rent.

Service was accepted of the writ on the 17th June, 1922, and a defence was delivered on the 11th January, 1923, which, amongst other matters, set up a defence that the writ of summons was not in the form and endorsed in the manner set forth in Order 3, rule 7, of the Rules of the Supreme Court and in the form prescribed by the said rules, and had not been served as prescribed by Order 9, rule 10, on the under tenants, if there would appear to be any; and gave notice that the defendant would submit that the action should be dismissed with costs on these grounds.

After this defence was delivered, and before taking any other step, the plaintiff brought on the present motion to amend the writ of summons by adding an additional endorsement to bring the case within the provisions of Order 3, rule 7.

H. D. Conner K.C. (with him *Hungerford*), for the plaintiff:—

The leave to amend should be given, as the endorsement, if wrong, is only irregular, and the irregularity has been waived by appearance and defence: *Allen* v. *Quigley* (2). The procedure required by Order 3, rule 7, is not prescribed by sect. 12 of the Irish Land Act, 1896 (59 & 60 Vict. c. 47), which is only in aid of execution, and the Court has therefore discretion to ignore the rule: *Howard* v. *Howard* (3). Amendment can be made under Order 28, rule 1.

(1) Before MOLONY C.J., DODD and SAMUELS JJ.
(2) 12 I. L. T. R. 46.
(3) 32 L. R. Ir. 454.

Bartley, for the defendant :—

The amendment should not be allowed, because it would prejudice the defendant, in whose favour the statutory period has run since the issue of the writ : *Weldon* v. *Neal* (1) ; *Doyle* v. *Kaufman* (2) ; *Lancaster* v. *Moss* (3) ; *Taaffe* v. *Ruttledge* (4) ; *Forbes* v. *Samuel* (5). The present endorsement is bad under Order 3, rule 7 : *Stawell* v. *Curran* (6) ; *Guinness* v. *Caraher* (7).

MOLONY C.J., having stated the facts set out above, proceeded :—

The defendants have contended that there is no power to amend, and that in any case an amendment should not be allowed where the effect would be to prejudice the defendants to an extent which could not be recouped by the payment of costs.

It is admitted that the lands sought to be recovered in the action are agricultural or pastoral in their character, and that portions thereof are in the hands of sub-tenants, and consequently the case comes within the provision of sect. 12 of the Land Law (Ireland) Act, 1896, and Order 3, rule 7, of the Rules of Court.

Order 3 is specific in its terms that where the holding is agricultural or pastoral the writ of summons seeking to recover possession shall be specially endorsed under rule 6 with a statement of the plaintiff's claim, and that such endorsement shall state that there is no other person in occupation as tenant otherwise than as immediate tenant to the plaintiff ; or, if there be any such person, naming them, and stating whether the plaintiff admits or denies the right of any such person, notwithstanding judgment for the plaintiff in the action, to retain possession as immediate tenant to the plaintiff for the portion of the premises in his occupation.

It was held in the case of *Stawell* v. *Curran* (6) by this Court that if the provisions of Order 3, rule 7, are not observed, the writ of summons will be set aside as irregular. On the authority of this case it would have been open to the defendants to set aside the writ instead of pleading to it, but they preferred to raise the point by way of defence. The plaintiff, however, seeks to amend by inserting in the endorsement the necessary averments, and thereby making his writ good.

In *Guinness* v. *Caraher* (7) it was held that the plaintiff should not have been allowed at the time of moving for judgment to amend so as to change an ordinary writ into a specially endorsed writ. I agree with the observations of FitzGibbon L.J., at p. 509 : "If a plaintiff has issued and served an ordinary writ, not specially endorsed, that writ cannot afterwards be changed

(1) 19 Q. B. D. 394.
(2) 3 Q. B. D. 7.
(3) 15 T. R. 476.
(4) 2 I. C. L. R. 22.
(5) [1913] 3 K. B. 706.
(6) [1903] 2 I. R. 331.
(7) [1900] 2 I. R. 505.

K. B. Div. (*I. F. S.*) 1923.

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into a specially endorsed one. I do not dispute, nor do I desire to define, the power to amend; I deny the power to create a specially endorsed writ after service. In the present case I do not shut my eyes to the fact that the writ has the words 'statement of claim' at the top and the name of the solicitors at the foot; and in the case of liquidated demands this may only be the difference of form between an ordinary and specially endorsed writ. These requirements were introduced for the purpose of securing at least two visible signs that a writ was specially endorsed, but they did not relieve the plaintiff from the obligation to satisfy the equally essential condition of inserting in the body of the writ all the averments necessary to give to the writ the effect of the applicable form."

I think, therefore, that the amendment should not be allowed in the present case, where it must be admitted that the writ as served was not specially endorsed as an ejectment within the meaning of the rules.

It is, however, possible for the action for the recovery of the rent to proceed, and our order will not affect the plaintiff's right in this respect.

DODD J:—

I concur in the decision. If it be necessary for the plaintiff to have a specially endorsed writ for recovery of the lands for non-payment of rent, we should not grant the application. But I am of opinion it does not matter to anyone what order we make, save as to costs. The endorsement on the writ is peculiar. There are two claims: 1, for possession of all the lands *as against the defendant*; and 2, for rent in indebitatus assumpsit. Whether 1 is a claim for a declaration of title, and the action is as such maintainable, it is not necessary to decide. If necessary, it can be argued at the trial. But it seems superfluous, for exactly the same issue will arise upon the claim for rent.

Mr. Bartley's contention about the tenants being interested in the question of the Statute of Limitations has nothing to rest upon. From the correspondence it appears the tenants have paid the defendant. But whether or not, if there be an outstanding tenancy found to exist between the plaintiff and the defendant, the statute cannot help the defendant; and the plaintiff's right of action against the sub-tenants cannot arise till later on. Mr. Bartley's contention that he cannot defend till he knows what lands the plaintiff claims is equally untenable. His case is that the plaintiff is not entitled to any rent out of any land.

SAMUELS J.:—

I concur. The application to amend should not in the present case be granted. I give no opinion as to the power of amendment which in circumstances other than those existing in this particular case may be exercised by the Court. I should hesitate very much before expressing any view which could be taken to limit those wide and beneficial powers, whether in actions of ejectment for non-payment of rent or otherwise.

The real question between the parties in the present case is the title to the lands. This is evident from the defence. The defendants claim to be absolute owners, and deny that there is or ever was a tenancy existing as between the plaintiff and them. They rely also on the Statutes of Limitation. There is a claim for rent in the writ and statement of claim. The issues between the plaintiff and defendants can be tried out upon this count. The plaintiff can abandon his claim for possession of the lands; and if his counsel considers it necessary to amend the pleadings in this respect, leave can be given to do so. I do not say there is any such necessity.

As the application has failed, the plaintiff should pay the costs. If the plaintiff desires to amend by striking out the claim for possession, I think he should be at liberty to do so without costs, as the action can be tried out on the defence as it stands.

Solicitors for the plaintiff: *O'Kearney & Barrington.*
Solicitor for the defendants: *Samuel Kerr.*

H. H.

Appeal.
(N. I.)
1923.

BURNS *v.* RADCLIFFE.

(1922. No. 5164.)

May 2.
May 9.

Landlord and tenant—Recovery of possession—"Dwelling-house"—House used as a temperance hotel—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *sect.* 12, *sub-s.* 2.

Certain premises, known as 7 College Square, East, in the City of Belfast, were let to the defendant in 1917 for the term of six months from 1st August, 1917, and thereafter from quarter to quarter, at the rent of £20 per quarter, in order that the defendant might carry on the business of a temperance hotel, and were used by the defendant as a temperance hotel.

The defendant, as proprietress of the hotel, resided there. In an action for recovery of possession of the premises, the defendant claimed to be entitled to retain possession on the ground that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied. Brown J. found that the premises were occupied by the defendant as her dwelling-house, although the real purpose of the letting was to carry on in them the business of a temperance hotel. He accordingly, following the decision of the English Court of Appeal in *Epsom Grand Stand Association* v. *Clarke* ([1919] W.N. 170), held that the defendant was protected by the Act, and gave judgment for the defendant.

Held by the Court of Appeal (Moore and Andrews L.JJ.), affirming the judgment of Brown J., that the premises came within sect. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), on the ground that the hotel trading was a business of such a nature that the premises in which it was conducted never lost the character of a dwelling-house.

Appeal from the judgment of Brown J., sitting without a jury, in an action for the possession of certain premises between the plaintiff, Thomas Robert Burns, and the defendant, May Radcliffe.

By an agreement dated the 22nd August, 1917, Alice Rose Lepper, Geraldine Amelia Lepper, and Ethel Maud Boydell Wright demised to the defendant the premises known as 7 College Square, East, Belfast, for the term of six months from August 1st, 1917, and thereafter from quarter to quarter, and it was agreed that either party might terminate the tenancy by three months' notice in writing, expiring on February 1st, 1918, or any subsequent quarter day, and it was provided that the rent should be £20 per quarter. One of the terms of the agreement was that the defendant should use the premises for the purpose of the business of a temperance hotel only. The defendant carried on the business of a temperance hotel in the premises, two of the rooms being reserved exclusively for her private use as her own separate apartments. The whole estate and interest of the landlords subsequently became vested in the plaintiff. The plaintiff instituted proceedings for recovery of possession of the premises, but the defendant claimed that she was entitled to retain possession on the ground that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied.

It was held by Brown J. that as these premises were occupied by the defendant as her dwelling-house, although the real purpose of the letting was to carry on in them a business, that of a temperance hotel, he was compelled by the decision of the English Court of Appeal in *Epsom Grand Stand Association* v. *Clarke* (1) to hold that the defendant was protected by the Act; he therefore gave judgment for the defendant.

May 9.

The plaintiff appealed to the Court of Appeal of Northern Ireland (2).

Pringle K.C. and *M'Kean,* for the plaintiff:—

The premises were let to the defendant that she might carry on the business of a temperance hotel; it was therefore let for business purposes, and is not a "dwelling-house" entitled to the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. We rely on paragraph 5 of the agreement of letting, by which the defendant was required to use the premises for the purpose of the business of a temperance hotel only. The question to be considered was what was the real, main, and substantial purpose of the letting. These premises had not been let as or for the purpose of a "dwelling-house," and there must be a letting for the purpose of a dwelling-house before sect. 12, sub-s. 2 (ii), of the Act applies; and in this case the letting was specifically for a business purpose.

[*Waller* v. *Thomas* (3); *Colls* v. *Parnham* (4); *Epsom Grand Stand Association* v. *Clarke* (1); *Callaghan* v. *Bristowe* (5); *Greig* v. *Francis and Campion* (6) were referred to.]

Murphy K.C. and *Ellison,* for the defendant:—

The defendant was not bound under the agreement to continue the user of the premises as a temperance hotel, but could have given up the business at any time and retained the premises under the agreement solely as a "dwelling-house." The fact that the premises were used by the defendant to carry on the business of a temperance hotel does not make it the less a "dwelling-house" entitled to the benefits of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The Court was not to be guided by the dominant purpose for which the letting was made, but by the real substantial use actually made of the premises, which use was in contemplation of both parties at the time the agreement was made. We rely on *Waller* v. *Thomas* (3), *Colls* v. *Parnham* (4), and *Cohen* v. *Benjamin* (7).

(1) [1919] W. N. 170.
(2) Before MOORE L.J. and ANDREWS L.J.
(3) [1921] 1 K. B. 541.
(4) [1922] 1 K. B. 325.
(5) [1920] W. N. 308.
(6) 38 T. L. R. 519.
(7) 39 T. L. R. 10.

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May 9.

MOORE L.J. :—

This action was brought by the plaintiff to recover possession of certain premises known as 7 College Square, East, in the occupation of the defendant. The only question arising on the defence offered was as to whether or not in the circumstances the defendant was afforded any legal defence by reason of the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act of 1920.

There had been a motion for final judgment for possession, which was refused by the Court; and, by consent of the parties, the trial before Mr. Justice Brown took place on the evidence contained in the affidavits filed by the respective parties for and against the motion.

The learned Judge found in favour of the defendant, and dismissed the action with costs, holding that he was bound to do so by the decision of the Court of Appeal in the *Epsom Case* (1).

I think, on careful examination of the facts, that the case really presents little difficulty. At the time of the agreement the house structurally was a residential house, in the sense that it was not a warehouse or a barn (differing in this respect from the cases referred to), and therefore a dwelling-house. The defendant was living in it, and carrying on through the greater portion of it the business of a temperance hotel. At the time of the letting an agreement in writing was entered into between her and the predecessors in title of the plaintiff that she should take the premises subject to a rent of £20 a quarter. The material part of this agreement, on which reliance has been placed by the plaintiff, is contained in its fifth paragraph, which runs as follows :—

"That the tenant shall not during the tenancy assign or sublet the said premises or any part thereof, nor make any structural alterations whatever on said premises, nor carry on therein any offensive trade or business, but shall use the said premises for the purpose of the business of a temperance hotel only."

The Increase of Rent and Mortgage Interest (Restrictions) Act of 1920 continued in slightly altered forms, with some extensions and some modifications, the protection already given to certain classes of dwelling-houses by the earlier Act of 1915; but for the first time it brought in a new class of building, namely, premises used for the purpose of a trade, profession, or business. These received separate treatment, but the period during which they were to be protected from disturbance was limited in duration, and has since expired. At the time when the *Epsom Case* (1) was decided it was found that very often a house let as a dwelling-house was used by its occupant not only as a dwelling-house, but also for the purpose of carrying on business; and it was frequently argued in those cases where the portion used for business was definitely segregated from the portion used as a dwelling, and where, of course, they were both

(1) [1919] W. N. 170.

comprised in the same letting, that this excluded the dwelling-house from being treated as such. This was the contention in the *Epsom Case* (1), where apparently the whole of the upper part of the house was used as a dwelling for the publican and his family, and the lower part for the purposes of an ordinary public-house.

In several of such cases the Court determined that what they had to look at was the preponderating nature of the premises, and they held that where the portion for business as distinguished from dwelling was of such importance the whole building might be treated as a dwelling-house. It was very much the same problem as that which used to confront the late Court of Appeal in Ireland on appeals from the Land Commission in the case of mill holdings, whether, as in *M'Conaghey* v. *Gledstanes* (2), a holding consisting of 54½ acres (Cunningham measure), with a mill upon it, was in fact a mill holding, and therefore outside the Land Acts; or whether it was an agricultural holding with a mill on it, and therefore within the Acts. It is admitted that the decision in the *Epsom Case* (1) was subsequently expressly covered by sub-clause 2, clause 2, of sect. 12 of the Act which we are now considering, which runs as follows:—"The application of this Act to any house, or part of a house, shall not be excluded by reason only that part of the premises is used as a shop or office, or for business, trade, or professional purposes."

It will be noted, however, that while the house is to be let as a dwelling-house, the mere user of it for business purposes will on the one hand entitle it to come within the benefits extended to business premises, and on the other hand will not necessarily prevent the claim from being made in respect of the dwelling-house where the business is carried on in it.

Applying the law to the present case, I find that the house, being a dwelling-house at the time of the agreement, must be taken to be let as such, unless there is something in the agreement to the contrary.

Mr. Pringle has urged that clause 5 of the agreement already referred to, on its true construction, restricts the use of the house to business purposes only. I do not think that this is the proper construction of that clause. I am of opinion that it did not compel the defendant to use the premises for the business of a temperance hotel, but that its object and effect is that she should not be at liberty to carry on any business in the premises—if she did carry on any business at all—except that of a temperance hotel. If I am right in this, it is an express authority to her to carry on that business in the dwelling-house which was demised.

Mr. Justice Salter has in two cases—*Tomkins* v. *Rogers* (3) and *Colls* v. *Parnham* (4)—decided that a house may at the same time be a dwelling-house and also be used for business purposes. We ourselves know the ordinary case of a dressmaker, who uses

(1) [1919] W.N. 170.
(2) [1895] 2 I.R. 438.
(3) [1921] 2 K.B. 94.
(4) [1922] 1 K.B. 325.

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her dwelling-house as a place for making dresses at home. Could anyone say that it was not a dwelling-house? While the occupation of letting lodgings is a "business" within the meaning of the Act, it is one carried on in the dwelling-house of the landlady. In the present case the defendant lived in the house; she superintended the letting of various rooms in the house for long or short periods, the comfort of and service upon her guests; she had two private rooms of her own, as any manageress would have; and I do not think it is any stretch of language to say that the house was her dwelling, in which she carried on her business by express authority from the landlord.

In looking at a case of this sort, naturally, a great deal must depend on what the business was; if it was a business incompatible with residence, then residence would possibly be excluded. Take an extreme case: if, for instance, the defendant had set up a soap factory in the three lower floors, then I think that, following the decision in the *Epsom Case* (1), we should consider which really dominated the letting—the business portion or the residential portion; but where the nature of the business is not incompatible with the residence of the tenant, if, as in this case, it would almost require it, I can see no reason for holding that the whole premises were not her dwelling-house. I differ from the Court below because, if the decision in the *Epsom Case* (1) applies to the facts of the present case, then there should be judgment for the plaintiff. But the circumstances are so entirely dissimilar that I think, therefore, though on different grounds from the learned Judge, who seems to have based his judgment on defendant's occupation of the two reserved rooms, that her defence succeeds, that the judgment entered for her was right, and that the appeal should be dismissed with costs.

ANDREWS L.J.:—

I entertain no doubt that the real and principal purpose for which the premises in this case were let to the defendant was that she should carry on therein the business of a temperance hotel. This is obvious both from the terms of clause 5 of the letting agreement and also from the subsequent user of the premises by the defendant. Indeed, in her affidavit opposing the final judgment motion she openly describes herself as an hotel proprietress, and refers several times to the "hotel business" which she was carrying on in the premises. The occupation of premises as an hotel was, in my opinion, even more clearly a "business" than was the using of the house in *Rolls* v. *Miller* (2) as a home for working girls, or the using of the premises in *Hobson* v. *Tulloch* (3) as a boarding-house for scholars attending a school. It seems to me, therefore, clear that the defendant might have relied upon the provisions of sect. 13 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, relating

(1) [1919] W. N. 170. (2) 27 Ch. D. 71. (3) [1898] 1 Ch. 424.

to business premises if that section were still in force. But its limited period of operation has now expired; and if the defendant is entitled to succeed, she must bring the case within the dwelling-house provisions of sect. 12 of the Act.

As a matter of first impression, it would seem that sects. 12 and 13 are mutually exclusive of one another, and that the same premises could not fall within the provisions of both sections; but a more careful consideration of the terms of these sections and of the relevant authorities has satisfied me that, although in the large majority of cases premises may come within one or other, but not both of the sections, there are yet exceptional cases where the character of the business is such that it may reasonably be said to be carried on in a "dwelling-house" within sect. 12, sub-s. 2, of the Act. Thus in *Tomkins* v. *Rogers* (1) the King's Bench Division in England held that the appellant's dwelling-house, occupied partly for her own residence and partly for letting rooms as lodgings, was "used for business purposes" within sect. 13 of the Act; and Salter J. in his brief judgment expresses the view that, though premises be a dwelling-house, yet, if they are used for business purposes, they come within the operation of sect. 13. This case has been considered in several more recent decisions, as its effect was at first somewhat misunderstood, and it was suggested that if sect. 13 applied to the premises, this necessarily excluded the operation of sect. 12. But in *Colls* v. *Parnham* (2) Salter J. removed all possible room for doubt on the subject when he said: "It is obvious that premises may be in fact a dwelling-house and at the same time be used for business purposes. If the decision in *Tomkins* v. *Rogers* (1) was that if premises are used for business purposes they cannot be a dwelling-house within the Act, I think myself that it cannot be supported." To the like effect is the opinion of Scrutton L.J. in *Duke of Richmond and Others* v. *Dewar and Others* (3): "Premises might be both a dwelling-house and also be used for business purposes; and when the protection of business premises came to an end on June 24th, 1921, the protection for a dwelling-house continued."

Other authority—*Laird* v. *Graves* (4)—could be relied upon, but I have already cited sufficient in support of the view of the Act which I have put forward. The hotel trading necessarily constituted a business, but it was a business of such a nature that the premises in which it was conducted never lost the character of a dwelling-house. It is upon this ground that I uphold the judgment of Brown J. I place no reliance whatever upon the exclusive occupation by the defendant of two rooms in the premises, which was so strongly emphasized in the defendant's affidavit, and so forcibly referred to by her counsel before us as bringing the premises within the operation of sect. 12, sub-s. 2, proviso ii. If it were necessary for the defendant to rely

(1) [1921] 2 K. B. 94.
(2) [1922] 1 K. B. 325.
(3) 38 T. L. R. 151, at p. 152.
(4) 55 I. L. T. R. 55.

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Andrews L.J.

upon this proviso, she would, in my opinion, fail, for we would in that event be obliged to apply the test which was laid down in *Waller* v. *Thomas* (1), and acted upon in *Greig* v. *Francis* (2) and other cases—what was the dominant purpose and principal user of the premises, i.e., of the premises as a whole: *Callaghan* v. *Bristowe* (3); and there could be only one answer to that question in the present case, namely, that it was the business of an hotel. But we are not troubled with any such issue in the present case, because, as I have pointed out, the business of an hotel can be carried on in what is referred to in the Act as a "dwelling-house." The question here is not as to the premises being used partly for one purpose and partly for another, but as to the actual user of the whole of the premises. Had it been permissible under the letting agreement for the defendant to carry on, say, a grocery business in the premises, and had she done so in all the rooms except two reserved for her own personal occupation and residence, I would unhesitatingly have held that she could place no reliance on sect. 12, because the character of the business would have been such as could not reasonably be said to be carried on in a dwelling-house, and there could have been no doubt as to the dominant purpose and principal user of the premises. But the present case is quite different. The word "dwelling-house" simply means a house to dwell in. If the defendant had invited twenty friends to come as visitors to her house, it would obviously have been a dwelling-house. It does not cease, in my opinion, to be such within the statute because her visitors are under an obligation to pay for their accommodation when taking their departure.

The appeal must be dismissed with costs.

Solicitors for plaintiff: *Shean & Dickson.*
Solicitors for defendant: *Moorhead & Wood.*

J. M'C.

(1) [1921] 1 K.B. 541. (2) 38 T.L.R. 519. (3) [1920] W.N. 308.

HUNTER *v.* M'KINLEY (1).

(1923. No. 547.)

Appeal.
(*N. I.*)
1923.

May 7.
May 11.

Parliament—Franchise—Right of member of the Royal Ulster Constabulary to vote at an election for members of Parliament of the United Kingdom—Constabulary (Ireland) Act, 1836 (*6 & 7 Wm. 4, c.* 13), *sect.* 18—*Parliamentary and Municipal Elections Act,* 1872 (*35 & 36 Vict. c.* 33), *sect.* 7—*Constabulary (Ireland) Act,* 1922 (*12 & 13 Geo.* 5, *c.* 55)—*Constabulary Act (Northern Ireland),* 1922—*Invalidity* (*12 & 13 Geo.* 5 (*N.I.*), *c.* 8), *sect.* 1, *sub-s.* 3—*Government of Ireland Act,* 1920 (*10 & 11 Geo.* 5, *c.* 67), *sects.* 14, 15.

The Constabulary (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 13), sect. 18, which enacted that any member of the Royal Irish Constabulary is liable to a penalty of £100 if he votes at an election for a member of Parliament whilst he remains a member of the Royal Irish Constabulary, or within six months after he retires from that force, does not apply to members of the newly formed Royal Ulster Constabulary.

Held by the Court of Appeal (affirming Wilson J.), that sect. 1, sub-s. 3, of 12 & 13 Geo. 5 (N.I.), c. 8, is ultra vires and void so far as it purports to apply sect. 18 of 6 & 7 Wm. 4, c. 13, to members of the Royal Ulster Constabulary, inasmuch as the Parliament of Northern Ireland has no power to alter the franchise or election laws relating to the Commons House of Parliament of the United Kingdom (10 & 11 Geo. 5, c. 67, sect. 14, sub-s. 5; sect. 15, sub-s. 1).

NEW TRIAL MOTION in which the plaintiff sought an order that the finding given and judgment entered for the defendant at the trial of the action might be set aside, and that in lieu thereof judgment might be entered for the plaintiff for the sum of £100, or in the alternative for a new trial. The statement of claim was as follows:—

1. The defendant is and was at the date hereinafter mentioned and at all material times a constable or member of the Royal Ulster Constabulary.

2. The defendant, being a member of the Royal Ulster Constabulary, was in accordance with the terms of the Constabulary Act (Northern Ireland), 1922, sect. 1, subject to all the enactments which regulated the management and control of the Royal Irish Constabulary.

3. The defendant, contrary to the form of the statute in that behalf, viz., the statute 6 & 7 Wm. 4, c. 13, sect. 18, voted on the 15th day of November, 1922, at an election held to elect a member or members to serve in Parliament for the counties of Tyrone and Fermanagh.

4. By reason of the premises, and in accordance with the form of the said statute 6 & 7 Wm. 4, c. 13, the defendant has become liable to pay the plaintiff a forfeit of the sum of £100.

(1) Before SIR DENIS HENRY, Bart., C.J., and MOORE and ANDREWS L.JJ.

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The defendant by his defence traversed the plaintiff's claim, and pleaded that he was not under sect. 1 of the Constabulary Act (Northern Ireland), 1922, or at all subject to all or any of the enactments which regulated the management and control of the Royal Irish Constabulary, and that he was entitled under the provisions of the Government of Ireland Act, 1920, to exercise the Parliamentary franchise, and to vote at said election.

Wilson J. found that the defendant did vote at the said election for members of the United Kingdom Parliament, and held that so far as sect. 1, sub-s. 3, of the Constabulary Act (Northern Ireland), 1922, purported to apply sect. 18 of the Constabulary (Ireland) Act, 1836, it was ultra vires and void, and dismissed the action.

Murnaghan (with him *M'Guckin*), for the plaintiff, submitted that the Royal Ulster Constabulary is the same force as the Royal Irish Constabulary in so far as its relations towards the Imperial Parliament are concerned. The Constabulary Act (Northern Ireland), 1922, is throughout an Act adapted from the Constabulary Code. During the transition period the Royal Irish Constabulary were merging into the Royal Ulster Constabulary. To say that the latter is a new force, in order to escape the disqualification of the Royal Irish Constabulary, is to misconceive the position entirely. Prima facie, sect. 18 of 6 & 7 Wm. 4, c. 13, is specifically incorporated by sect. 1 of the Constabulary Act (Northern Ireland), 1922. Under the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), laws relating to elections to the Imperial Parliament were not to be altered. The Constabulary were always disqualified, and the Parliament of Northern Ireland has no power to remove that disqualification. To allow the Constabulary to vote is an alteration of the election laws, and would be ultra vires. The Parliament of Northern Ireland has not altered election laws by incorporating Constabulary regulations. The disqualification cannot be repealed by getting rid of the old force and setting up a new one. *In re the Initiative and Referendum Act* (1) is in point. Could County Court Judges, by changing the names of their offices, cease to be subject to the election laws? If so, every disqualification created by statute could be got rid of by creating similar offices with different names. Can it be suggested that magistrates appointed under Acts of the Northern Parliament are entitled to vote? If the Constabulary (Northern Ireland) Act, 1922, can be read as not being repugnant to Government of Ireland Act, 1920, the Court ought to construe it as intra vires, especially as the force is the same, carrying out the same duties, with the same responsibilities. We submit that the disqualification directly attached, that the words of the statute directly dealt with it, and that there is no ground for saying that the enactment in itself is ultra vires.

(1) [1919] A. C. 935.

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Pringle K.C. (with him *Babington K.C.* and *M'Coy*), for the defendant :—

By an Act of the Imperial Parliament the Royal Irish Constabulary was to be finally disbanded on 31st August, 1922. Under the Act of 6 & 7 Wm. 4, c. 13, a constable who was in a constabulary force under the Imperial Parliament was prohibited from voting for a member of that Parliament; but to say that the prohibition was to apply to a force which was appointed under the authority of the Parliament of Northern Ireland, and which was paid by that Parliament, is an entirely different matter. The two forces are essentially different. The Imperial Parliament saw fit to abolish the Royal Irish Constabulary, and upon their disbandment they ceased to be an existing body. The Parliament of Northern Ireland had no right whatever to interfere with the right of members of the Royal Ulster Constabulary to vote for the Imperial Parliament. By sect. 1 of 12 & 13 Geo. 5 (N.I.), c. 8, all the regulations relating to the management and control of the Royal Irish Constabulary are applied to the Royal Ulster Constabulary, but this cannot include prohibition of voting. It would be illogical for the Imperial Parliament to hand over to the Parliament of Northern Ireland authority to legislate in regard to qualifications for the Imperial Parliament. It has not done so. A new force has been called into being for a different area and under a different authority.

May 11.

MOORE L.J. [having stated the pleadings and the result of the trial, and having read the two questions stated by Wilson J., which were—1. Did the defendant whilst a member of the Royal Ulster Constabulary vote at the said election for members of Parliament of the United Kingdom? 2. If so, is he liable to the penalty of £100?] delivered the judgment of the Court as follows :—

As the law stood at the date of the passing of the Government of Ireland Act of 1920 (10 & 11 Geo. 5, c. 67), constables of the Royal Irish Constabulary were prohibited from voting at an election of a member for a county or borough returned to serve in the Parliament of the United Kingdom. Had that force continued it would have been beyond the powers of the Parliament of Northern Ireland to remove this disqualification (sect. 14, sub-s. 5) for three years. But this only applied to the several officers mentioned in sect. 18 of 6 & 7 Wm. 4, c. 13. Those officers and men ceased as such to be members of the Royal Irish Constabulary on their subsequent disbandment under the 12 & 13 Geo. 5, c. 55. There was therefore no class of persons from that moment in existence on whom the prohibition and consequent disability could any longer operate.

By applying the Act of 6 & 7 Wm. 4, c. 13, to the newly formed Royal Ulster Constabulary, the Parliament of Northern

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Ireland were attempting to impose upon the new force an electoral disqualification which altered their rights, because it cannot be held that in law there was any continuing succession between them and the former Royal Irish Constabulary. There was disbandment of the older force, fresh enlistment into the new force; the liability of the new force is only to serve in six counties instead of anywhere in Ireland; their paymasters are the Government of Northern Ireland instead of the Imperial Government; and in our opinion none of the Acts relating to the Royal Irish Constabulary applies to them in any way unless and until they were made applicable, as they were so made by this statute.

But though the statute so made them applicable, they were altering the election law in existence at the date of the Act of 1920 by attempting to impose on a new force an old disqualification, which only applied to the Royal Irish Constabulary. This the Parliament of Northern Ireland had no power to do.

The question how far this affects the position of the resident magistrates has been urged upon us in argument. We have not had, however, before us the actual facts as regards these officials. Presumably if they were transferred from the Imperial service to that of Northern Ireland under the statutory conditions existing at the date of the Act of 1920, these would still apply; if, on the other hand, these gentlemen had their former employment terminated, and if they then accepted a new and distinct appointment, possibly the decision in the present case would govern the situation. But as the facts are not before us, we express no opinion on the question.

We think the judgment of Mr. Justice Wilson was perfectly right, and that the motion for a new trial should be refused with costs.

Solicitor for the plaintiff: *George Martin.*
Solicitor for the defendant: *W. Edmund Orr.*

J. M'C.

COMMISSIONER OF VALUATION FOR NORTHERN IRELAND, APPELLANT; THOMAS ANDERSON, LTD., RESPONDENTS (1).

K. B. Div. (*N. I.*) 1923.

May 10.
May 18.

Valuation—Reclaimed slob-lands—23 & 24 *Vict. c.* 4, *sect.* 10—*Principle of valuation—Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 65—*Valuation* (*Ireland*) *Act*, 1852 (15 & 16 *Vict. c.* 63), *sect.* 11.

Reclaimed slob-lands are to be valued as "land" in accordance with the provisions of the Valuation Acts.

CASE STATED under statute 23 & 24 Vict. c. 4, sect. 10, by the Recorder of Belfast.

The case stated set out the facts as follows:—

It appeared in evidence that the premises in question consisted of a portion of reclaimed slob-land, containing 3,412 square yards or thereabouts, and that it was held by Messrs. Thomas Anderson, Ltd., under an agreement in writing dated 9th August, 1918. By this agreement the Belfast Harbour Commissioners let to Thomas Anderson, Ltd., a piece of ground of the above-named area at the rate of 1s. per square yard, amounting to a rent of £170 12s., payable quarterly. By paragraph 7 of this agreement it was provided that no permanent buildings should be erected on the ground; by paragraph 9 that the lessee should erect a hoarding around the ground, and not build on it any other building without the consent of the lessors.

From the entry in the valuation list it appeared that the grounds were described as a yard, and were comprised in the column headed "Railways, Fisheries, Tolls, Half-rents," etc., at the valuation of £170.

In giving judgment, the Recorder summarized the facts found, the arguments used, and the conclusions of fact and law as follows:—

"The question as to the method of valuing this piece of ground was an important one, and appeared to have been left by the statute in a rather unsatisfactory position. The ground was reclaimed ground, and had not been previously let or valued, and there was a good deal of similar land in the vicinity, which would naturally be coming on for corresponding letting and valuation. I had been furnished with a copy of the valuation, which set out the occupier as Thomas Anderson, Ltd.; the lessors as the Belfast Harbour Commissioners; and the description of the tenancy as a yard. The valuation was put down as £170. It was not described in the schedule as 'land,' and did not appear

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from it to have been valued as land. Part of the agreement of letting was that the ground should be surrounded by a hoarding, and that there should be no other building put upon it without the consent of the Belfast Harbour Commissioners. It appeared to be used at present for some of the purposes of the business carried on by Thomas Anderson, Ltd., at their other premises, but it was not in any sense attached physically to those business premises, was about 150 yards distant from them, and was held under a separate agreement. In answer to me, both valuers had said that in fixing the valuation they did not have regard to any of the prices of agricultural produce that were set out in sect. 11 of the Valuation Act, 1852, but had valued it under the general principles laid down in the Acts governing the valuation of rateable hereditaments. It appeared to me, however, that both valuers had in fact valued it in exactly the same way as they would have valued a building, viz., on a rental basis. The premises had never been used for any agricultural purpose, and, so far as anybody could reasonably foresee, never would be so used. They would be used for storage ground, or for building ground. Having regard, however, to the sections of the Acts governing the modes of valuation, I was of opinion that there was no jurisdiction in the Commissioner to value this piece of ground as anything but land, and that it had not been valued as land. In support of the suggestion made on behalf of the Commissioner, that there was jurisdiction to value it as a building, I was referred only to sect. 65 of the Local Government Act, 1898, which provides that in the case of a general revaluation, land in the borough shall be valued in the manner as directed by sect. 11 of the Valuation Act, 1852, with respect to houses and buildings; and this section seemed to me to lead to the conclusion that, except in cases of general revaluation, there is no authority in the Commissioner to value land as buildings. I asked further if there was any provision in any of the local Acts dealing with the matter, but was not referred to any such.

"Concluding, therefore, that the valuers on both sides had acted on a wrong principle, I felt myself unable to fix a valuation, and stated that I would remit the case to be re-heard by the Commissioner in accordance with the provision of the Valuation Acts; and I stated further that as the decision seemed to me to lead to inconvenient and absurd results, I thought it should be further tested, and accordingly I would state a case at the request of either party. Having come to these conclusions, I held:

"(A) That the valuation placed upon this piece of ground by the Commissioner of Valuation was arrived at on a wrong basis, inasmuch as under existing legislation there was no jurisdiction to value the premises in question otherwise than as land, as prescribed by sect. 11 of the Valuation Act, 1852; and

"(B) That accordingly the case should be remitted to the Commissioner for revaluation on the basis prescribed by said sect. 11.

"The questions for the decision of the Court were:—

"1. Was my conclusion at A correct? If so, the Court should make such order as to the making of the valuation as may seem to it to be requisite and proper.

"2. If my conclusion at A was incorrect, was the mode of valuation adopted by the Commissioner of Valuation correct and in accordance with law? If so, the case may be remitted to me, with directions for valuation on the evidence given or to be given."

Davison, for the appellant:—

The premises should not be treated as land in the agricultural sense. Yards have always been valued in the same way as houses or buildings. Once there had been a revaluation, a new principle, that of letting value, was applied to land. If that principle had been intended to be limited to actual revaluation, it should have been done in express words. This yard is not land in the agricultural sense. The general principle of letting value applies as in *Alma* v. *Corporation of Dublin* (1), *Armstrong* v. *Commissioner of Valuation* (2), and *Commissioner of Valuation* v. *Clonbrick Coal Co.* (3).

Campbell K.C. and *Fox*, for the respondents:—

The Recorder was right in holding that this piece of reclaimed slob-land should be valued as land. "Land" in the Valuation Acts bore its natural meaning. If this slob-land is actually "land," it should be valued as provided by sect. 11 of the Valuation Act, 1852. The fact that power is given on a general revaluation to treat land in the same manner as houses and buildings shows that in the absence of such a provision this could not be done.

May 18.

SIR DENIS HENRY, Bart., C.J., delivered the judgment of the Court as follows:—

This case comes before us on a case stated by the learned Recorder of Belfast, pursuant to the provisions of the statute 23 & 24 Vict. c. 4, sect. 10.

Messrs. Thomas Anderson, Limited, lodged an appeal from the decision of the Commissioner of Valuation valuing certain premises in their occupation at a sum of £170. The premises in question were described in the valuation list as a yard, and were placed in the column in the list headed "Railways, Fisheries, Tolls," etc. There are two other columns in this form, one headed "Lands," the other "Buildings."

It is stated by the learned Recorder "that the premises in question consisted of a portion of reclaimed slob-land, containing 3,412 square yards or thereabouts, and that it was held by the

(1) I. R. 10 C. L. 476. (2) [1905] 2 I. R. 448. (3) [1896] 2 I. R. 560.

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appellant under an agreement in writing dated 9th August, 1918. By this agreement the Belfast Harbour Commissioners let to Thomas Anderson, Limited, a piece of ground of the above-named area at the rate of 1s. per square yard, amounting to a rent of £170 12s., payable quarterly. By paragraph 7 of this agreement it was provided that no permanent buildings should be erected on the ground; by paragraph 9 that the lessee should erect a hoarding around the ground, and not build on it any other building without the consent of the lessors. From the entry in the valuation list it appeared that the grounds were described as a yard, and were comprised in the column headed "Railways, Fisheries, Tolls, Half-rents," etc., at the valuation of £170.

In our opinion sect. 65 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), is against the contention of the Commissioner of Valuation so far as Messrs. Anderson's case is concerned. It provides in sub-s. 1 that "a general revaluation of rateable hereditaments under the Valuation Acts may be made, as respects a county borough, on the application of the council, and the council so applying shall pay such portion, not exceeding one-half of the costs of the revaluation, as the Treasury direct; and upon any such general revaluation the land in the borough shall be valued in the manner directed by sect. 11 of the Valuation (Ireland) Act, 1852, with respect to houses and buildings."

Messrs. Anderson's property never came under a general revaluation, and therefore sect. 65 has no application; and they are left under the former law. Under the former law their property must be valued as land in accordance with the provisions of the Valuation Acts. The property is not a building, nor does it come within any other definition; and sect. 65, which was intended to get over similar difficulties by providing in the case of a general revaluation for a valuation in the case of land on the basis of sect. 11 of the Act 15 & 16 Vict. c. 63, with respect to houses and buildings, has no application where there is no general revaluation.

The land in this case had no existence as a rateable hereditament at the time of general revaluation. It came into existence for this purpose after the date in question, and must be dealt with under the earlier law before 1898.

We hold that the conclusion arrived at was correct, and that the premises should be valued as land under the provisions of the Valuation Act, 1852.

Solicitor for the appellant: *J. H. B. Gunning.*
Solicitor for the respondents: *J. C. W. Rea.*

J. M'C.

ULSTER BANK, LIMITED, APPELLANTS; THE MINISTRY OF FINANCE FOR NORTHERN IRELAND, RESPONDENTS (1).

Appeal. (*N.I.*) 1923.

June 11.
June 12.

Rates — Assessment — Evidence of value — 15 & 16 *Vict. c.* 63, *sect.* 22 — *Rateable value of similar hereditaments in neighbourhood — Admissibility.*

Held by the Court of Appeal, N.I., reversing the King's Bench Division, that the County Court Judge, on an appeal from an assessment of rateable value of premises, should receive evidence tendered as to the rateable value of other premises if it can be shown that by reason of some similarity in conditions their net annual value may assist in determining the net annual value of the premises in question.

Pointer v. *Norwich Assessment Committee* ([1922] 2 K.B. 471) followed. *Commissioner of Valuation* v. *Galvin* (unreported, Q.B.D., 5 June, 1899) and *Commissioner of Valuation* v. *Anderson* ([1922] 2 I.R. 202) explained.

APPEAL from Divisional Court on a case stated by the County Court Judge of Tyrone. The Ulster Bank, Limited, appealed against a valuation of £70 made under 15 & 16 Vict. c. 63, sect. 22, upon certain bank premises owned by the appellants, and situate in the Square, Stewartstown, Co. Tyrone.

The premises had been purchased by the appellants in the year 1919 for the sum of £800 from the representatives of the late Dr. Harris. The valuation of the premises was then £28, and they had been let at a rent of £24 per annum, the landlord paying taxes and being responsible for repair. On the appellants taking possession, they proceeded to take down and reconstruct the premises, which was done at an outlay of £8,639. The reconstructed premises were not so large as the buildings they replaced, but they had been rendered in every way suitable for carrying on the business of a bank. A valuation of £106 was first put upon the reconstructed premises by the respondents, but this was subsequently reduced to £70, from which assessment the present appeal was brought. Stewartstown possesses 700 inhabitants, and has two bank agencies, as well as one permanent bank, but is a town of much less importance than its neighbouring town, Cookstown, which is really the market town for the whole district. There is, however, a small market held in Stewartstown once a week. The letting value of houses in Stewartstown is considerably less than that of houses in Cookstown.

(1) Before MOORE and ANDREWS L.JJ.

Appeal. (*N. I.*) 1923.

ULSTER BANK *v.* MINISTRY OF FINANCE (N. I.)

Mr. Robert Newton, J.P., an experienced estate agent, examined for the appellants, estimated the letting value of the reconstructed premises at £40 a year; they would, in his opinion, let at that figure to a doctor, a civil servant, or some such tenant. It was suggested to him in cross-examination that some other bank would be willing to give £70 a year for them, if available in their present condition of suitability for banking business. His reply was that he did not know the letting value of the premises to another bank.

Evidence was tendered by the appellants of the existing valuations of other premises alleged to be similar in the neighbourhood and district, viz., the following premises:—In Stewartstown, Patrick Corr's premises, known as "The Railway Hotel"; Joseph Quinn's licensed premises, the old Ulster Bank premises, Charles S. Dudgeon's shop, dwelling-house, and premises, with 2A. 1R. 3P. of land attached; H. S. Burrow's premises, known as "The Imperial Hotel"; H. S. Burrow's other licensed premises in West Street, and the Presbyterian manse; and of the following bank premises in Cookstown, Co. Tyrone (population, 4,000):—The Ulster Bank, Bank of Ireland, Belfast Bank, and Hibernian Bank.

This evidence was objected to on behalf of the respondents; and the County Court Judge was referred to the cases of *Commissioner of Valuation* v. *Galvin* (1), decided on 5th June, 1899, and *Anderson* v. *The Commissioner of Valuation* (2), decided by the King's Bench Division (N.I.) on 22nd June, 1922.

On consideration of these authorities the County Court Judge was of opinion that the tendered evidence was irrelevant, and refused to receive it.

He arrived at the conclusion on the evidence in the case that the sum of £70 was not in excess of what a hypothetical tenant might be expected to pay for the premises at the present time, and accordingly dismissed the appeal with costs, but agreed to state a case for the opinion of the King's Bench Division as to whether or not he was right in refusing to receive the evidence of the other valuations tendered by the appellants. If, in the opinion of the Court, the question should be answered in the affirmative, viz., that the County Court Judge was right in point of law in refusing to receive the said evidence, the valuation of £70 is to be affirmed, with £2 2s. costs allowed at the hearing. If, on the contrary, the question should, in the opinion of the Court, be answered in the negative, the order made dismissing the appeal is to be set aside and the case referred back to rehear the appeal and to receive the said evidence tendered on behalf of the appellants of existing valuations of other premises in the neighbourhood.

(1) Unreported.

(2) [1922] 2 I. R. 202.

The Divisional Court (1) affirmed the County Court Judge, and dismissed the appeal with costs.

The appellants appealed to the Court of Appeal of Northern Ireland (2).

Murphy K.C., *Macafee K.C.*, and *M'Guckin*, for the appellants:—

The net point is whether or not the County Court Judge was entitled to take into consideration the valuation of the other premises in the neighbourhood in order to assist him in arriving at a proper valuation of the premises before him. We mainly rely on the authority of *Pointer* v. *Norwich Assessment Committee* (in the King's Bench Division) (3). The case was decided on the authority of the *Commissioner of Valuation* v. *Anderson* (4). The sections in both English and Irish Acts are substantially the same, and we submit that the Court should follow the English case of *Pointer* v. *Norwich Assessment Committee* (3), and not the Irish case of *Commissioner of Valuation* v. *Anderson* (4). The County Court Judge is not to shut his eyes to the valuation of adjoining premises which are similar. All that *Galvin's Case* (5) decided was that a valuation was not to be reduced simply to secure uniformity with other similar premises. The Court of Appeal in England acted on a sensible principle, that of evidence of letting value, in *Pointer* v. *Norwich Assessment Committee* (3). *Galvin's Case* (5) did not decide this wide principle, nor was it decided by the *Commissioner of Valuation* v. *Anderson* (4).

Megaw K.C. and *Davison*, for the respondents:—

There are distinctions between the English and Irish valuation codes; the assessment authority is different, and so is the machinery for revaluation. Where, as here, there is an actual decision on the Irish valuation code, the Court should follow it. In the present case there is no similarity of other premises; such evidence was irrelevant, and was not admissible; and in any case no such evidence was tendered. As to *Pointer* v. *Norwich Assessment Committee* (3), the properties that were referred to were of the same character, and it appeared that the premises had been valued the previous year, so the committee had some knowledge of them. That is the real ground why evidence in that particular case was admitted. What is to be considered here is what is the actual letting value of the premises; and it is proposed to give in evidence valuations of an indeterminate number of holdings in the district. We rely on the distinctions that exist between the English and Irish Valuation Acts. We submit that no sufficient case has been made out to upset the existing practice and to admit evidence as to similar premises.

(1) In the King's Bench Division, before Sir DENIS HENRY, Bart., C.J., and BROWN J.

(2) In the Court of Appeal, before MOORE and ANDREWS L.JJ.

(3) [1922] 2 K. B. 471. (4) [1922] 2 I. R. 202. (5) Unreported.

Appeal.
(*N. I.*)
1923.

ULSTER BANK
v.
MINISTRY OF FINANCE
(N. I.)

June 12.

MOORE L.J. :—

This case came before us by way of appeal from the County Court Judge of Tyrone on a case stated. The case stated sets out that the premises had been purchased by the appellants in the year 1919 for the sum of £800 from the representatives of the late Dr. Harris. The valuation of the premises was then £28, and they had been let at a rent of £24 per annum, the landlord paying taxes, and being responsible for repair. On the appellants taking possession, they proceeded to take down and reconstruct the premises; this was done at an outlay of £8,639. The reconstructed premises were not so large as the buildings they replaced, but they had been rendered in every way suitable for carrying on the business of a bank. A valuation of £106 was first put on the reconstructed premises by the respondents, but this was subsequently reduced to £70, from which assessment the present appeal was brought.

The matter came before the County Court Judge of Tyrone on the question of whether the sum of £70 was a fair amount, as not being in excess of what a hypothetical tenant might be expected to pay for the premises.

During the hearing evidence was tendered to the County Court Judge of the existing valuations of other premises in the neighbourhood and district alleged to be similar. This evidence was objected to on behalf of the respondents, who referred to an unreported case of *Commissioner of Valuation* v. *Galvin* (1), decided on 5th June, 1899, and the *Commissioner of Valuation* v. *Anderson* (2).

On consideration of these authorities the County Court Judge held that he was coerced by them, and declined to receive the tendered evidence on the ground of irrelevancy. The whole question is: was he right in so refusing to receive the evidence? not was he right in refusing to act on it? The house assessed since reconstruction has never been let. "How, then, should a person charged with the duty of fixing an annual value upon it approach the question of what would be a proper sum? Obviously, if there can be found an exactly similar house, evidence as to that will throw light on the question, and is relevant. That does not often happen in fact, but similarity in the case of other buildings in use can afford comparison. There may be similarity in some degree, e.g., a house like this, but not used for banking purposes, or a house structurally dissimilar, but carrying on a corresponding business in a corresponding neighbourhood. On the amount of real similarity depends the weight to be given to the evidence. The evidence was tendered here for the purpose of such comparison, but obviously should not be acted on until some degree of similarity has been established.

As to *Anderson's Case* (2): Mr. Murphy's explanation of the head-note is quite logical, i.e., that the County Court Judge,

(1) Unreported.

(2) [1922] 2 I. R. 202.

having once arrived at his decision as to rent, etc., cannot lower the amount of that decision by a fresh consideration, bringing in the valuations of more lowly rated houses in the neighbourhood. This is what *Galvin's Case* (1) decides. The question before us is as to the admissibility of the tendered evidence. We rule it admissible, but we say nothing as to the weight to be attached to it in arriving at the ultimate decision of the Court; that is peculiarly a question for the County Court Judge as judge of fact. The appeal should be allowed.

ANDREWS L.J.:—

I concur. The differences between the English and Irish statutes, to which our attention has been directed, provide no sufficient reason, in my opinion, for the difference in practice which is alleged to have grown up in the two countries as to the admissibility of evidence of the character objected to. As I read the decision in *Galvin's Case* (1)—a printed copy of the judgment in which we have had before us—it amounts to no more than this: that other valuations are not to be the governing and controlling factor in the County Court Judge's mind. In other words, *Galvin's Case* (1) simply decides that if the County Court Judge has once determined and is satisfied as to what the correct valuation should be, he is not justified in reducing such valuation merely to secure uniformity with the valuation of other similarly circumstanced buildings in the locality. That decision is quite correct; but if *Anderson's Case* (2) is intended to go further, as the head-note rather implies, I am not prepared to follow it.

Pointer v. *Norwich Assessment Committee* (3), in which the contrary view was taken by the English King's Bench Division, is, in my opinion, based not only on common sense, but on sound principles of law; and it is, in my opinion, as applicable to our Irish as to English legislation.

In deciding that evidence of this character is admissible it must, however, be clearly understood that we say nothing as to its precise weight. That will depend upon circumstances not before us. We merely decide that it is the duty of the County Court Judge to receive any evidence tendered as to the rateable value of other premises when the person who tenders same has first proved, to adopt the words of Shearman J. in *Pointer's Case* (3), that the other premises are so similar in their nature to the hereditament in question that their net annual value throws some light upon the net rental value of his own premises.

Solicitor for the appellants: *J. Porter Harris.*
Solicitor for the respondents: *J. H. B. Gunning.*

J. M'C.

(1) Unreported. (2) [1922] 2 I. R. 202. (3) [1922] 2 K. B. 471.

Appeal. (*I. F. S.*) 1923. July 11.

IN THE MATTER OF THE WORKMEN'S COMPENSATION ACT, 1906, AND IN THE MATTER OF AN ARBITRATION BETWEEN CORNELIUS CROWLEY, APPLICANT, AND THE COUNTY COUNCIL OF LIMERICK, RESPONDENTS (1).

Employer and workman—"Contract of service"—Workman — Quarrying stones for County Council—Paid by the piece—Workmen's Compensation Act, 1906 (6 *Ed.* 7, *c.* 58), *sect.* 13.

The applicant for compensation was engaged in quarrying stones for a county council. He was paid by the piece, and had to work in a part of the quarry indicated to him by a foreman. The latter measured periodically the quantity of stones quarried. Otherwise there was no interference or intervention on the part of the foreman, and the applicant could work how and when and just as much as he chose.

Held, that there was no evidence of any contract of employment, and that the applicant was not a workman within the meaning of sect. 13 of the Workmen's Compensation Act, 1906.

APPEAL by the applicant from an order made by the County Court Judge of Limerick, refusing an application for compensation under the Workmen's Compensation Act, 1906.

From the evidence it appeared that Cornelius Crowley, the applicant, was engaged in quarrying stones for the County Council of Limerick on February 16th, 1923, and that a splinter struck him in the right eye. He was paid by the cubic yard for quarrying the stones. All the men engaged at the quarry, except Crowley and another man, were put on time work in October, 1922. The County Surveyor made this arrangement in order to test the cubic rate cost as between time rate and a rate per cubic yard. The rate for the applicant was fixed at 3s. 3d. per cubic yard for quarrying alone, and 9d. for clamping the stones. The tools were supplied by the County Council. The time workers operated in one part of the quarry, and the men on piece work operated in another part, pointed out to them by the foreman. It was the duty of the latter to see that the stones quarried were small enough to go into the stone-breaker, and also to measure the amount quarried for the purpose of making payments on account to the men on piece work.

The County Court Judge found as facts the following:—(*a*) That no directions were given to Crowley, except that he was not to work in a certain area in the quarry, namely, that in which the men on time work were engaged; (*b*) that it was agreed in October, 1922, that if the stone quarried by him was not "clamped" or heaped in a certain manner and place, the 4s. per cubic yard was to be reduced to 3s. 3d., i.e. 9d. below what he had

(1) Before MOLONY C.J. and RONAN L.J.

been previously paid; and (*c*) that there was no interference or intervention on the part of the foreman, except in the latter making nearly every fortnight a rough estimate of the work done, for the purpose of interim payments on account, and in making a final assessment of the balance due to the applicant when the stone-breaking machine measured up the amounts. Finally, the County Court Judge found (*d*) that Crowley could work how and when and just as much as he chose.

The learned County Court Judge added: "But for the report of the decision in *Ryan* v. *County Council of Tipperary* (1), I should have thought that the onus would have lain on the workman to establish the fact of his being a workman in the employment of the respondents. But, taking the decision as it is reported, I had to consider whether there was evidence on which I could find that he was not a workman. The only evidence given in the case went to show that in October, 1922, certain restrictions on his freedom of action were imposed which had not existed before, i.e. he was only to work in a prescribed area, and his remuneration rate was to depend on the manner in which the work was to be done by him. These restrictions had apparently not affected his previous working. And in my opinion he had been theretofore not a workman of the respondents, and did not by the imposition of such restrictions become any more a workman of theirs."

Serjeant Hanna K.C. and *R. Holmes*, for the applicant and appellant:—

The applicant was a workman within the meaning of sect. 13 of the Workmen's Compensation Act, 1906 (6 Ed. 7, c. 58), and not an independent contractor. The case is governed by *Ryan* v. *Tipperary County Council* (1). That case is distinguishable from *Ryan* v. *Tipperary County Council* (2).

Binchy, for the respondents, was not called upon.

The Court found that there was no evidence of any contract of employment; that the appellant was not a workman within the meaning of sect. 13 of the Workmen's Compensation Act, 1906; and accordingly dismissed the appeal with costs.

Solicitors for the appellant: *J. J. Power & Son.*
Solicitor for the respondents: *P. J. Sullivan.*

C. L.

(1) 49 I. L. T. R. 1. (2) 46 I. L. T. R. 69.

Appeal.
(N. I.)
1923.

June 1, 15.

THE COUNTY COUNCIL OF FERMANAGH, APPELLANTS; HENRY FARRENDON, RESPONDENT (1).

Malicious injury—Injury to person in Northern Ireland caused by shot fired from outside limits of Northern Ireland—Compensation—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 106; *Criminal Injuries (Ireland) Act*, 1919 (9 *Geo.* 5, *c.* 14), *sect.* 1, *sub-s.* 1 (*a*); *sect.* 1, *sub-s.* 2.

Applicant F., who was a private in the Tank Corps, was shot at and wounded while in the County of Fermanagh by a shot fired from the County of Donegal. The applicant applied for compensation for the wounding against the County of Fermanagh.

Held, that the malicious injury was committed in Fermanagh, and that the applicant was entitled to recover against the County of Fermanagh.

CASE STATED for the opinion of His Majesty's Court of Appeal in Northern Ireland by Andrews L.J. at the Fermanagh Spring Assizes, 1923.

The case stated set out the facts as follows:—

This case came before me, sitting as Judge of Assize at Enniskillen for the County of Fermanagh, in the month of March, 1923.

The applicant, who was a private in the Tank Corps, was, on 30th May, 1922, patrolling a road 200 yards from Pettigo, in the County Fermanagh, when very heavy fire was opened on the tank from the hills on the opposite side of Pettigo, in the County of Donegal. Fire was returned from the tank, and during the progress of the fight a bullet, which, it was admitted, was fired from the County Donegal, entered one of the apertures in the tank, and a splinter of it struck the applicant in the right eye. He succeeded in bringing his tank out of action, and was taken to the military hospital in Enniskillen, and afterwards to the military hospital in Belfast. He was ultimately discharged from the army as unfit for service owing to the total loss of the sight of his right eye.

The County Court Judge gave the applicant a decree for £300, leviable on the County of Fermanagh at large, the amount of which, if liability existed, was not questioned by either side.

A. B. Babington K.C., for the applicant, relied upon sect. 1, sub-s. 1 (*a*), of the Criminal Injuries (Ireland) Act, 1919, and upon the third paragraph of sect. 1, sub-s. 2, of the same Act. The County Council of Fermanagh are, he contended, liable under this latter sub-section, as the injury "occurred" in that county. The apparent hardship to the ratepayers of the County of Fermanagh is no greater than it would have been if the

(1) Before SIR DENIS HENRY, Bart., C.J., and MOORE L.J.

applicant had been injured in the same place by raiders from the County of Donegal, who had come across the border into County Fermanagh.

E. S. Murphy K.C., for the County Council of Fermanagh, argued that the decree of the County Court Judge was repugnant to common sense and fair play, as none of the ratepayers of County Fermanagh had caused or contributed to the applicant's injury. He submitted that, if the decree be right, criminals may congregate at will in a county of the Free State and work their wicked will against the peaceful inhabitants of an adjoining county in Northern Ireland, who will have to pay for their criminal acts. He also referred to sect. 106 of the Grand Jury (Ireland) Act, 1836, under which the power of making a decree is conferred upon the County Court of the county within which the murder or maiming shall have been "committed." (I would also refer to the use of the word "perpetrated" in the last line of the section.)

He further called attention to the fact that the word which was used in sect. 1, sub-s. 2, of the Act of 1919 was "occurred," not "suffered."

I held that the application was properly brought in County Fermanagh, as in my opinion the "injury occurred" in that county, and I accordingly affirmed the decree of the County Court Judge for £300.

The question for the opinion of the Court is whether the County Council of Fermanagh are liable under the Malicious Injury Code to the applicant, a member of the military forces of the Crown, who, whilst in the County of Fermanagh, was maliciously injured in his person in the execution of his duty by a bullet fired from the County of Donegal.

If the answer to this question be in the affirmative, the decree of the County Court Judge for £300 shall be affirmed, with £8 19s. 4d. costs and £6 8s. 3d. witnesses' expenses in the County Court, and £18 17s. costs of the appeal. If the answer be in the negative, the decree of the County Court Judge shall be reversed and the claim dismissed, and, by consent, without costs or expenses in either the County Court or on appeal. It was further agreed that the costs of this case stated, which was being treated as a test case, should in either event be borne and paid by the County Council of the County of Fermanagh.

Murphy K.C. and *M'Coy,* for Fermanagh County Council:—

Here there was a regular military operation against forces congregated in County Donegal. It is admitted that the shot came from County Donegal. The case is very important from the point of view of the border counties, as an award can only be made against a county in Northern Ireland. None of the ratepayers of County Fermanagh had caused or contributed to the applicant's injury. If the award be right, criminals may con-

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gregate at will in a county of the Free State and work their wicked will against the peaceful inhabitants of an adjoining county in Northern Ireland, who will have to pay for their criminal acts. By sect. 106 of the Grand Jury (Ireland) Act, 1836, the power of making a decree is conferred upon the county within which the murder or maiming shall have been "committed." The word used in sect. 1, sub-s. 2, of the Criminal Injuries (Ireland) Act, 1919, is "occurred," not "suffered." The perpetrator could properly be indicted in the county where the shot was fired. There is no malice in Fermanagh. The attempt to murder must have been committed in County Donegal. We submit that the proper test is: where was the crime originally committed? A crime cannot be committed in two places; it can only be committed in the place where the criminal act is done. A man firing a shot in Donegal thereby commits a crime there.

Babington K.C. and *Davison,* for the applicant:—

The apparent hardship to the ratepayers of the County of Fermanagh is no greater than it would have been if the applicant had been injured in the same place by raiders from the County of Donegal who had crossed the border into County Fermanagh. We rely upon sect. 1, sub-s. 1 (*a*), of the Criminal Injuries (Ireland) Act, 1919, and upon the third paragraph of sect. 1, sub-s. 2, of same Act. Under this latter sub-section the County Council of Fermanagh are liable, as the injury "occurred" in that county. The Criminal Injuries (Ireland) Act, 1919, originally extended to the whole of Ireland, and still applies to all servants of the Crown carrying out their duties in Northern Ireland; it clearly covers the present case. The Legislature looked at the injury from the point of view of the person who received it. We submit that the maiming was committed in County Fermanagh. In *Coombe's Case* (1) a man standing on shore fired a gun and killed a man at a certain distance at sea, with the intention to kill upon the high seas, where the death happened, and not where the shot was fired, and so the offender was brought within the Admiralty jurisdiction. It is not necessary that the crime should be wholly committed in the county where the injury was received. We submit that the decision of Andrews L.J. was correct.

June 15.

MOORE L.J. delivered the judgment of the Court as follows:—

This was an appeal by way of case stated from an affirmance by Lord Justice Andrews at the Fermanagh Spring Assizes of a decree for £300 charged on the County of Fermanagh in favour of the applicant, Henry Farrendon.

The facts are simple. Some evilly disposed person in the County of Donegal fired at Henry Farrendon, a private in the

(1) [1785] 1 Leach, 388.

Tank Corps, and wounded him so that he lost an eye. At the moment when he received the wound Henry Farrendon was in the County of Fermanagh.

The question as stated for us by the Lord Justice is whether or not in these circumstances the County of Fermanagh is liable. There is no doubt but that the applicant comes within the class of persons entitled to claim; against what respondents is the claim to be made? We decided in *Plumbs' Case* (1) that this Court cannot make a decree against any county in the Free State. Therefore, if the applicant is to succeed, he must succeed against County Fermanagh alone.

The claim is made under sect. 106 of the 6 & 7 Wm. 4, c. 116, as amended by the schedule to the Adaptation of Irish Enactments Order, and by the Criminal Injuries (Ireland) Act, 1919 (9 Geo. 5, c. 14), whereby it is provided that it is in the County Court of the county in which "the murder or maiming shall have been committed" that the decree shall be made, and that the amount shall be raised off the "county at large or the district in which such murder or maiming shall respectively have been perpetrated." This makes each county responsible for malicious injuries occurring within its own borders; and by sect. 140 of 6 & 7 Wm. 4, c. 116, machinery was provided in certain cases for making neighbouring counties contributory.

The judgment of the Court in the case of *Ballymagauran Co-operative Agricultural and Dairy Society* v. *Cavan and Leitrim County Councils* (2), as explained and approved in *Noblett* v. *Leitrim County Council* (3), shows that the county takes the place of the wrongdoers, over whom it is presumably supposed to have control. But Mr. Murphy, in a very ingenious argument, has submitted two contentions: first, that there must be a malicious injury within the county, and, if I understand him correctly, that in the present case the malice existed in County Donegal and the injury was suffered in Fermanagh, or, alternatively, that the injury in Fermanagh was but the sequence of a crime committed in Donegal, and must be so referred to it, that we are to hold the malicious injury itself was committed in Donegal, and lays stress on the fact that County Fermanagh can have no control over wrongdoers in Donegal. On close examination I do not think that either of these propositions is tenable.

I agree that when the miscreant, whoever he was, fired the shot in Donegal he committed a crime. But what crime?—surely firing at with intent. If he had missed the applicant, there probably would have been no claim for compensation. But when a man fires a weapon with intent to wound, then as soon as he does wound the intent is successful, and the further crime of wounding is superadded. The second crime, though originating

(1) Ante, p. 54.

(2) [1915] 2 I. R. 85.

(3) [1920] 2 I. R. 143.

Appeal. (*N.I.*) 1923.

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Moore L.J.

in Donegal with the intent, can only take place where the victim is hit, and in the present case that was in Fermanagh.

So far as malice is alleged to have been proved to have existed in Donegal only, I have been much helped by the very apt reference to which Mr. Begley in the Board of Education case (infra) drew our attention from the judgment of Kelly C.B. in *R.* v. *Rogers* (1): "A letter is intended to act on the mind of the recipient; its action upon his mind takes place when it is received. It is like the case of the firing of a shot or the throwing of a spear. If a shot is fired or a spear thrown from a place outside the boundary of a county into another county with intent to injure a person in that county, the offence is committed within which the blow is given."

I think that if a man fires at another with intent to wound, the intent is present during every fraction of space and moment of time that is traversed by the bullet from the moment it leaves the lethal weapon until it strikes or passes its victim. There, therefore, was continuing malice in "the intent" of the bullet, not only in Donegal, till it crossed the border, but in Fermanagh, from the border till it struck the applicant; in other words, it is the same thing as if the assailant was himself firing it at every inch of its course. This may appear to be somewhat meticulous, but I think it is a logical sequence from a true analysis of the circumstances which Mr. Murphy's argument itself invited us to make.

In my opinion the malicious injury was committed in Fermanagh within the meaning of sect. 106 of the Grand Jury Act as amended, and the County of Fermanagh is liable.

The decree will be affirmed, with costs of the appeal.

Solicitor for appellants, the Fermanagh County Council: *Sir Charles F. Falls.*

Solicitor for applicant, Henry Farrendon: *James Cooper.*

J. M'C.

Appeal. (*N.I.*) 1923.

June 1, 15.

THE COUNTY COUNCIL OF FERMANAGH, APPELLANTS; AND THE BOARD OF EDUCATION OF DONEGAL PRESBYTERY OF PRESBYTERIAN CHURCH AND REV. ARCHIBALD DUFF, APPLICANTS AND RESPONDENTS.

Malicious injury—Property situate in Northern Ireland—Shot fired from Irish Free State—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 135—*Malicious Damage Act,* 1861 (24 & 25 *Vict. c.* 97), *sect.* 51—*Local Government (Ireland) Act,* 1898 (61 & 62 *Vict. c.* 37), *sect.* 5, *sub-s.* 1, *sub-s.* 3.

The applicants were the owners of church property situate in the County of Fermanagh to which malicious injury was done by shots fired from the County of Donegal.

Held, that the malicious damage was committed in the County of Fermanagh, and that the applicants were entitled to recover against that county.

(1) 3 Q. B. D., at p. 34.

Appeal.
(N. I.)
1923.

FERMANAGH CO. COUNCIL *v.* BOARD OF EDUCATION OF DONEGAL PRESBYTERY.

June 15.

CASE STATED by Andrews L.J. at the Fermanagh Spring Assizes, 1923.

The applicants were owners of a church, manse, and cottage, situate in Tulyhomon portion of the town of Pettigo, in the County of Fermanagh, to which malicious damage was done by shots which were admittedly fired from the County of Donegal. Malice was admitted; and, subject to the question of legal liability, the amount of compensation was agreed upon between the applicants and the County Council of Fermanagh at the sum of £70.

Murphy K.C. and *M'Coy*, for Fermanagh County Council:—

The right to recover compensation is based on the committal of crime, and the crime or offence in this case, which consisted in the malicious firing of the shots, had been committed across the border in the County of Donegal.

Begley K.C. and *J. C. Davison*, for the applicants, referred to the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), sect. 135; the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), sect. 51; and the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), sect. 5, sub-s. 1: *R.* v. *Rogers* (1).

MOORE L.J. delivered the judgment of the Court as follows:—

This case, dealing with injury to property committed under similar circumstances to *Farrendon's Case* (2), involves exactly the same question, though arising under different sections. The argument presented for the County Council of Fermanagh was the same.

We have considered the matter, and, for the reasons already given in *Farrendon's Case* (2), we think the appeal against the decision of Andrews L.J. fails, and should be dismissed with costs.

Solicitor for appellants, the Fermanagh County Council: *Sir Charles F. Falls.*

Solicitor for applicants, the Board of Education of Donegal Presbytery of Presbyterian Church and Rev. Archibald Duff: *James Cooper.*

J. M'C.

(1) 3 Q. B. D., at p. 84.

(2) Ante, p. 180.

K. B. Div. (*I. F. S.*) 1923.

April 30. May 1.

Appeal.

June 18, 19. July 17.

BETWEEN ARTHUR GUINNESS, SON, & CO., LIMITED, APPELLANTS, AND G. C. MORRIS (H.M. INSPECTOR OF TAXES), RESPONDENT; AND BETWEEN ARTHUR GUINNESS, SON, & CO., LTD., APPELLANTS, AND THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Income tax—Excess profits—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *sect.* 145, *Case* 1, *Schedule D—Finance Act* (*No.* 2), 1915 (5 & 6 *Geo.* 5, *c.* 89), *sect.* 45, *sub-s.* 5—*Sale of barley requisitioned under Defence of the Realm Acts—Trade profit.*

The appellant company acquired stocks of barley for the purpose of brewing stout. These stocks, under the War Emergency legislation, were requisitioned by the Royal Commission on Wheat Supplies, and disposed of in circumstances which resulted in a profit to the appellants. Income tax and excess profits duty were assessed on these profits, and the assessments were confirmed by the Special Commissioners for Income Tax. On case stated for the decision of the High Court:

Held by the Court of Appeal (O'Connor M.R., Ronan L.J., Pim J. dissentiente), reversing the King's Bench Divisional Court (Molony C.J. and Dodd J.), that the profits in question were not annual profits or gains arising from the trade and business of the appellants, and that the assessments were not properly made.

Mullingar Rural District Council v. *Rowles* ([1913] 2 I.R. 44) distinguished. *The Glenboig Union Fireclay Co., Ltd.*, v. *The Commissioners of Inland Revenue* (unreported) applied.

CASE STATED under the Income Tax Act, 1918, sect. 149; the Finance (No. 2) Act, 1915, sect. 45, sub-s. 5; and the Taxes Management Act, 1880, sect. 59, by the Commissioners for the Special Purposes of the Income Tax Acts, for the opinion of the King's Bench Division of the High Court of Justice in Southern Ireland.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 21st November, 1921, for the purpose of hearing appeals, Arthur Guinness, Son, & Co., Limited, hereinafter called the appellants, appealed against additional assessments to income tax in the sums of £20,450 for the year ending 5th April, 1919, £17,207 for the year ending 5th April, 1920, and £20,114 for the year ending 5th April, 1921, made upon them under the provisions of the Income Tax Acts, and against an assessment to excess profits duty in the sum of £126,014 (subject to a set-off in respect of deficiencies in previous accounting periods) for the accounting period of three months ending 30th June, 1917, made upon them by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III, and subsequent enactments.

The sole question raised on the appeal was whether certain profits arising from the sale of barley in the circumstances hereinafter described ought to be included as profits, arising from a trade or business carried on by the appellants, for the purposes of assessment to income tax and excess profits duty.

2. The appellants are a company incorporated under the Companies Acts, whose main object is to carry on in Great Britain, Ireland, and elsewhere the trade or business of common brewers, distillers, wine, spirit, and aerated and mineral and other waters manufacturers, and merchants, maltsters, hop merchants, and licensed victuallers, and any other business incidental to or arising out of, or which can be conveniently carried on in conjunction with such business, or any of them.

3. For use in the manufacture of stout the appellants habitually purchase and hold large stocks of barley, which they use solely as raw material for the manufacture of the commodity sold by them. Except on the occasions referred to in this case, they have never sold any barley as such.

4. In April, 1917, owing to the shortage of materials for making bread, the Government put in force its powers under the Defence of the Realm Act, and requisitioned the appellants' stocks of barley.

5. By the Barley (Requisition) Order, dated 16th April, 1917, all persons owning or having power to sell or dispose of any barley were directed to place such barley at the disposal of the Food Controller, and to deliver the same to him, or such persons as might be named by him, in such quantities and at such time as the Food Controller might from time to time require. In accordance with the terms of the Order, the appellants furnished to the Food Controller, on a form supplied for the purpose, a return of all barley in their possession or under their control, which amounted to 196,555 quarters. By a series of notices served on the appellants from time to time, the Royal Commission on Wheat Supplies instructed the appellants to supply barley to various millers who required it, at prices fixed by the Commission. In compliance with these instructions, 163,313 quarters of barley were disposed of, which had cost the appellants in all £561,191, and eventually the appellants received in respect of these supplies a sum of £714,935. A profit of £153,744 was therefore derived from this series of transactions.

6. In January, 1918, the situation in Ireland as regards the supplies of cereals for bread had become critical, and the appellants received an urgent appeal from the Royal Commission on Wheat Supplies for assistance in providing 18,000 quarters of barley for immediate needs. In response to this appeal, the appellants supplied 16,288½ quarters of barley, which had cost them £60,224, and for which they received £64,484, thus making a further profit of £4,260.

7. In February, 1918, the Food Controller issued a further Barley (Requisition) Order, under which the appellants supplied

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further quantities of barley, which had cost them £28,320, at prices amounting in all to £28,626, thus obtaining a further profit of £306.

8. In all cases the sales of barley, which were very numerous, were made nominally to the Royal Commission on Wheat Supplies; but in fact the barley was sent under instructions from the Commission to millers, who remitted the price to the appellants. There were subsequent adjustments of accounts between the appellants and the Commission.

9. The total amount received by the appellants for barley sold as above described under the instructions of the Royal Commission on Wheat Supplies was £808,045. When the control was removed and the appellants were able again to purchase barley, they replaced the stocks so sold at a cost of £918,000, or approximately £110,000 more than they had obtained by the sale of the barley. The whole of the cost of replacement of the stocks was charged as an expense in the accounts of their business for the periods in which such cost was incurred.

[Paragraph 10 exhibited the relevant Orders and correspondence.]

11. It was contended on behalf of the appellants that the profit arising from the sale of barley (*a*) was not a profit arising from the trade or business carried on by the appellants; (*b*) was not an annual profit; (*c*) was an accretion of capital: (*d*) arose from an isolated transaction; (*e*) arose from a compulsory or involuntary transaction, which was contrary to the interest of the appellants; and (*f*) was not chargeable to income tax or excess profits duty.

12. It was contended on behalf of the Crown that the said profit formed part of the annual profits or gains arising from the trade or business carried on by the appellants, and was chargeable to income tax and excess profits duty.

13. We, the Commissioners who heard the appeal, after considering the evidence and arguments put before us, held that the profit arising from the sale of barley by the appellants to or under the instructions of the Government formed part of the annual profits or gains arising from the trade or business carried on by the appellants, and fall to be included in the computation of the appellants' profits for the purposes of income tax and excess profits duty, and we confirmed the assessments under appeal.

Herbert Wilson K.C., *FitzGibbon K.C.*, and *Phelps*, for the appellants.

S. L. Brown K.C., *T. Sullivan K.C.*, and *G. W. Shannon*, for the Commissioners of Inland Revenue.

MOLONY C.J.:—

The appellants are a company incorporated under the Companies Acts, whose main business is the manufacture of stout, and in the usual course of trade they purchase large stocks of barley, which they use solely as raw material for the manufacture of the commodity sold by them. By the Barley (Requisition) Order 1917, the Food Controller, acting under the powers conferred on him by Regulations 2F and 2G of the Defence of the Realm Regulations, requisitioned the barley of the appellants, and the Royal Commission on Wheat Supplies instructed them to sell same on behalf of the Commission to various millers, at prices fixed by the Commission.

In 1917 they sold, on the instructions of the Royal Commission, 163,313 quarters of barley, and a profit of £153,744 was derived from this series of transactions.

In January, 1918, the situation in Ireland as regards the supply of cereals for bread had become extremely critical, and the appellants received an urgent appeal from the Royal Commission for assistance in providing barley for immediate needs. The appellants at once responded to this appeal, and sold 16,288½ quarters of barley, making a further profit of £4,260.

In February, 1918, another Barley (Requisition) Order was issued by the Food Controller, called "The Barley (Requisition) Order, 1918," and under and in pursuance of this Order the appellants sold further quantities of barley, on which they obtained a profit of £306.

In respect of these transactions additional assessments were made upon the appellants, under the provisions of the Income Tax Acts, for £20,450, £17,207, and £20,114, and a further assessment was made to excess profits duty in the sum of £126,014 under the provisions of the Finance (No. 2) Act, 1915, Part III, and subsequent enactments.

The appellants appealed to the Special Commissioners of Income Tax, who held that the profit arising from the sale of barley by the appellants to or under the instructions of the Government formed part of the annual profits or gains arising from the trade or business carried on by the appellants, and fell to be included in the computation of the appellants' profits for the purposes of income tax and excess profits duty. The Commissioners accordingly confirmed the assessments, and the case now comes before us on a case stated by them.

Mr. Brown and Mr. Shannon have argued that the profits arising from the sale of barley were annual profits or gains within Case 1 of Schedule D (Income Tax Act, 1842), which deals with "duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act," and in any event were within Case 6 of the same schedule, which imposes liability on all

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annual profits or gains not charged by virtue of any other rule or schedule.

It was contended by the appellants that the profit did not arise from the trade carried on by them, but was a compulsory or involuntary transaction, contrary to their interest. It was, however, admitted that selling barley was within their statutory powers; and it seems to me that where there is a sale of goods intra vires from which a profit arises, liability attaches, even though the sale is compulsory.

A similar contention was put forward in this Court in the case of the *Mullingar Rural District Council* v. *Rowles* (1). In that case a district council, by virtue of the provisions of the Public Health (Ireland) Act, 1878, provided waterworks for the purpose of supplying water to the inhabitants of their district, and thereby made a profit. Under the Public Health Act an obligation is imposed upon the sanitary authority to provide a supply of water to any ratepayer within the district who asked for it, and in such a case the person thus supplied is made liable to pay for the special advantage thereby obtained by means of a water-rate or by agreement or by meter. It was contended that there was no trading within the meaning of the Income Tax Acts, but this contention was not accepted by the Court, and the profits of the council were held liable to income tax. The Lord Chief Baron, in the course of his judgment, said (p. 53): "Mr. O'Connor endeavours to contend that in respect of the transactions under consideration there is nothing in the nature of trading, because the only person who can get water is the owner of a rateable hereditament; that the assessment has to be according to the poor law valuation; that the rate is fixed by one party, and not by agreement between both parties. I consider that it is trading, notwithstanding that there is a limited class who alone are permitted to purchase the water should they so desire, and notwithstanding that the price is one that has been fixed by Parliament or otherwise, or that the rate is one that has been fixed by one of the parties only, because the other party need not apply for the water unless he is willing to pay that price. The essence of trading in this sense is buying and selling; that the property in a subject-matter passes from one person to another in consideration of a price to be paid by that other."

In the present case, by reason of the buying and selling, which, as the Chief Baron says, is the essence of trading, a profit was made by the appellants, and it was a profit which was made in respect of the trade carried on by them.

It was next contended by the appellants that even if they were carrying on a trade, the profits were not annual profits or gains within the meaning of the Income Tax Acts. It is, however, to be noted, as was pointed out by the Lord President in the case of the *Scottish Provident Institution* v. *Farmer* (2), that the

(1) [1913] 2 I. R. 44.

(2) 6 Tax Cases, 34, at p. 38.

word "annual" is used for the purpose of showing that the tax which is being levied is a tax upon income, or, in other words, annual profits, and not upon capital. Annual profits may, I think, be defined as the amount of gain made by the business in the year, and are to be ascertained for the purpose of assessment by setting against the income earned the cost of earning it: see *Gresham Life Assurance Co.* v. *Styles* (1), and the *Spanish Prospecting Co., Ltd.* (2); within this definition the profits made by the appellants clearly fall. It was next contended that the profits made by the sale were not income, but were accretion of capital; and in this connexion strong reliance was placed on the recent case in the House of Lords of the *Glenboig Union Fireclay Co., Ltd.*, v. *The Commissioners of Inland Revenue* (3), a copy of which has been furnished to us by the respondents.

In that case, it appears, the Glenboig Co. held mining leases of some 1,835 acres of fireclay field in or near Glenboig, and the company's objects were to acquire profit by working the mines under and by virtue of the title of rights which they held under the leases. In the course of working the fields the company approached the line of the Caledonian Railway Co.; and the railway company, after some litigation, proceeded to negotiate with the Glenboig Company for the purpose of preventing any further working adjacent to their railway. Arbitration proceedings ensued for the purpose of determining what sum the railway company were bound to pay for this privilege, and ultimately the sum of £15,316 was fixed as the sum payable by the railway company, and this sum was accordingly paid. The question then arose in reference to proceedings to recover excess profits duty whether this sum was properly included as a profit in the appellants' balance sheet. It was, however, pointed out that the fireclay fields were capital assets of the Glenboig Company, and that the effect of the transaction was to sterilize the asset from which otherwise profit might have been obtained. This was put perfectly clear by Lord Buckmaster in his judgment, in which he said: "It therefore only remains to consider whether the sum of £15,316 was properly included as a profit in the appellants' balance sheet for the year ending 31st August, 1913. The argument in support of its inclusion can only be well founded if the sum be regarded as profits or a sum in the nature of profits earned in the course of their trade or business. I am quite unable to see that the sum represents anything of the kind. It is said, and it is not disputed, that the amount was, in fact, assessed in considering that the fireclay to which it related could only be worked for about two and a half years before it would be exhausted, and it is consequently urged that the amount therefore represents nothing but the actual profit for the two and a half years received in one lump sum. I regard that argument

(1) [1892] A. C. 309, per Lord Herschell, p. 321.

(2) [1911] 1 Ch. 92, per Moulton L.J., p. 98.

(3) Unreported.

as fallacious. In truth the sum of money is the sum paid to prevent the fireclay company obtaining the full benefit of the capital value of that part of the mines which they were prevented from working by the railway company. It appears to me to make no difference whether it be regarded as a sale of the asset out and out or whether it be treated merely as a means of preventing the acquisition of profit that would otherwise be gained. In either case the capital asset of the company to that extent has been sterilized and destroyed, and it is in respect of that action that the sum of £15,316 was paid." Lord Wrenbury puts the case very much in the same way: "First as to the £15,316, this was compensation for being precluded from working part of the demised area which otherwise the appellants might have worked and thereby made profit. Was that compensation profit? The answer may be supplied, I think, by the answer to the following question: Is a sum profit which is paid to an owner of property on the terms that he shall not use his property so as to make a profit? The answer must be in the negative. The whole point is that he is to make a profit and is paid for abstaining from seeking to make a profit. The matter may be regarded from another point of view: the right to work the area in which the working was to be abandoned was part of the capital asset consisting of the right to work the whole area demised. Had the abandonment extended to the whole area all subsequent profit by working would, of course, have been impossible, but it would be impossible to contend that the compensation would be other than capital. It was the price paid for sterilizing the asset from which otherwise profit might have been obtained. What is true of the whole must be equally true of part."

The *Glenboig Case* (1) would bear a resemblance to the present if it had proved impossible to obtain other barley for the purposes of the company's business, just as in that case it was impossible to obtain other fireclay, but so far from the capital being sterilized by the sale it was, in fact, possible to employ the sum received in the purchase of other barley, sufficient for the company's purposes, but at an increased cost, for which due allowance has been made.

It was next contended that the profit arose from an isolated transaction, which was not part of the ordinary business carried on by the appellants. There is, however, no doubt that if in the course of trade profit is made out of an isolated transaction the liability to income tax may accrue. This appears clear from the case of *Benyon & Co., Ltd.*, v. *Ogg* (2). Benyon & Co. carried on business as coal merchants, ship and insurance brokers, and as sole selling agents for various colliery companies, in which latter capacity it was part of its duty to purchase waggons on behalf of its clients. The company saw an

(1) Unreported.

(2) 7 Tax Cases, 124.

opportunity of making a profit by the purchase of waggons as a speculation on its own account and accordingly purchased seventy-five waggons and resold them at a profit of £2,500. This amount was declared liable to income tax by the Commissioners. The company contended that the profit arose from a speculation in waggons which was in the nature of a capital profit from the sale of an investment, and that as it was no part of its business to purchase and sell waggons, and no similar transaction as that in dispute had ever taken place previously or since, the profit in question was not an "annual profit or gain" but an isolated transaction of a capital nature. The company relied on the cases of the *Hudson Bay Co.* v. *Stevens* (1) and *Tebrau (Johore) Rubber Syndicate* (2). Sankey J. held that these cases were distinguishable, and dealing with the argument of its being an isolated transaction said: "I do not think it is possible to say that the mere fact that it was an isolated transaction at once takes it out of the category of rateable property. I think in most cases an isolated transaction does not fall to be chargeable, but I think you have to consider the transaction, and you cannot lay it down as a matter of law without regard to the circumstances that, in this case, the £2,500 is not chargeable. Although it is perfectly true that the transaction began with one purchase and ended with one sale, that, I think, is only a coincidence. I think it was perfectly open for the Commissioners to find as they have found. It seems to me that it was profit made in the operation of the appellants' business." To the same effect are *Humphrey* v. *Pearse* (3) and the *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (4), which are both cases of isolated transactions creating liability to income tax.

I have, so far, dealt with the case in reference to the assessment of income tax, but a further argument has been addressed to us in reference to excess profits duty, to which it is necessary to refer. Liability to excess profits duty is imposed by the Finance (No. 2) Act, 1915, sect. 38; and sect. 40, sub-s. 1, provides that the profits arising from any trade or business shall be separately determined for the purposes of excess profits duty, but shall be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purposes of income tax, subject to certain modifications which are set out in the first part of the fourth schedule to the Act, to which, however, it is not necessary to refer for the purposes of the present case.

The law affecting excess profits duty was substantially altered by sect. 35 of the Finance Act, 1918, which provides, amongst other matters, "that for the purposes of excess profits duty the profits arising from the sale at any time after the 22nd April, 1918, otherwise than in the ordinary course of trade of the

(1) 5 Tax Cases, 424.
(2) 5 Tax Cases, 654.
(3) [1913] 2 I.R. 462.
(4) [1921] 1 K.B. 64.

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trading stock or part of the trading stock belonging or formerly belonging to any trade or business, shall be deemed to be profits arising from a trade or business, and where any such sale takes place after the trade or business has ceased, the trade or business shall be deemed to have been carried on up to and including the date on which the sale takes place, and the accounting period shall be taken to be such as the Commissioners of Inland Revenue may determine." It was attempted to argue that excess profits were not chargeable in the present case because there was not a sale in the ordinary course of trade, and the section was relied on as supporting the inference that profits otherwise than in the ordinary course of trade were not assessable at least before the date mentioned. The Commissioners have, however, found that the profits were "annual profits or gains" arising from the trade or business carried on by the appellants, and the case of *O'Kane* v. *Commissioners of Inland Revenue* (1) shows, apart from all other questions, that once there is evidence to support that finding the case is concluded. As Lord Buckmaster stated in his judgment: "It is said on behalf of the appellants that if, instead of selling in this way, the whole of the stock had been sold by auction on one occasion, it would be impossible in those circumstances to claim duty upon the profits that were made. On the other hand, they admit that the process of liquidation might be so prolonged, and might be so associated with further replenishments of stock, that it would be impossible to say that the profits that were earned in the course of that liquidation were not profits to which the Statute applies. In other words, according to the appellants' own contention the question must be a question of fact whether, in the particular circumstances of the case, the transactions on which the profits had arisen were transactions which can be found to be profits arising from any trade or business. In the present case it has been found by the Commissioners that they do so arise, and not only, in my opinion, is there abundant evidence to support that finding, but although this would be unnecessary for the purpose, the finding is, in my opinion, in entire agreement with what the facts established. If, therefore, my Lords, when you consider the Statute of 1915 you find that the profits in this case are within the taxing provisions, the question raised on this appeal is determined, unless the subsequent Statute, to which counsel for the appellants referred, shows that the words that are used in the former Statute, if ambiguous, require a meaning to be put upon them other than that which you have given them.

"My Lords, I can find nothing whatever of the kind in the Act of 1918. All I find there is this: that by section 35, sub-s. 1, a provision is introduced that excess profits duty may be charged upon profits which do in fact arise from a sale otherwise than

(1) 56 I. L. T. R. 25.

in the ordinary course of trade' of the trading stock or part of the trading stock belonging to or formerly belonging to any trade or business that only shows that there may be other methods of disposing of the stock than the ordinary course of trade, and that in the course of those methods of disposal profits may arise which might not have been within the provisions of the earlier and are within the compass of the later Act. That does not, to my mind, assist in the least in considering what the meaning of 'profits arising from trade or business' in sect. 38, sub-s. 1, may be. But even if it were to be held that sect. 35, sub-s. 1, of the later statute should be read altogether with sect. 38, sub-s. 1, of the former statute, so that the earlier statute would be limited by a provision that the profits are to arise from the ordinary course of trade or business, the finding of fact in this case is that that is what has occurred; and once more I repeat, my Lords, that it appears to me that there was abundant evidence which would justify that conclusion."

I respectfully adopt the words of Lord Buckmaster, and applying them to the present case, I am of opinion that there is ample evidence to support the findings of fact of the Commissioners, and I also think that their decision was not erroneous in fact. In point of law the assessments in question must be confirmed, with costs to the respondents.

DODD J.:—The facts of the case have been so fully set forth, the law on the subject has been so clearly stated, and the cases cited have been so carefully analysed by my Lord, that I should be disposed to content myself by saying I concur.

There are some considerations, however, that impel me to add a few words of my own. It is the magnitude of the sums involved and the standing in the mercantile world of the eminent company who challenge the assessment, that make it desirable to emphasise the decision as one arrived at independently by each member of the tribunal.

A proposition has been advanced in argument founded upon a fallacy that has often been exposed. It has been urged that the transaction about the barley was a sale of capital, and therefore not assessable. It was a sale of capital. But the conclusion does not follow upon the premises. It is the perpetual consumption and reproduction of capital that is the foundation of trade. A tradesman selling goods over the counter is selling part of his capital. He replaces his capital by fresh buying. The replacement in its turn is sold. The frequency of this operation is described in mercantile phraseology as the "turn over." Each sale results in a profit or loss. The net profits are ascertained in his annual stock-taking. If successful he has earned his profits. Profits are the reward of capital as wages are the reward of labour.

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The word capital is used in book-keeping in a slightly different sense. The capital account is confined to part of the venture that does not change year by year, and fixed capital has come to be recognized as having a different place in the business from what has been called circulating capital. That only means that the one portion circulates more frequently than the other. But if in the course of trading part of the so-called fixed capital is sold, e.g. old machinery for the purpose of buying new, the old portion sold would come into the accounts of the year. In the annual balance sheet the sale of such machinery must be taken into account on one side. The sum required to replace must be taken into account upon the other, and the net profits must be ascertained. That is sound mercantile usage, good book-keeping, and the Statute requires that the Commissioners must have regard to it in their assessment. Was that done in this case? In paragraph 9 of the case stated, the method followed is set out as follows:—

"The total amount received by the appellants for barley sold as above described under the instructions of the Royal Commission on wheat supplies was £805,045. When the control was removed and the appellants were able again to purchase barley, they *replaced* the stock so sold at a cost of £918,000, or approximately £110,000 more than they had obtained by the sale of the barley. The whole cost of the replacement of the stocks was charged as an expense in the accounts of their business for the periods in which such cost was incurred." The emphasis on the word "replaced" is of course mine. After all necessary adjustments and costs of replacement the company were found to have made more profits than in the period before the war, with which the Commissioners were to compare the figures. And the duty coming to the Crown on that basis was £126,000.

The principle adopted was sound, the application of it careful. How can we touch it? It may be the company might have made greater profits if they had been permitted to turn the barley into stout. The finished stout would have been sold, and the price realised would have been carried to the profit and loss account. It is not the less profits because it was sold before it was converted into stout. In another case the barley they had bought they sold. The price of the stout would have exceeded perhaps enormously the price they were compelled to accept for the barley. But that would have been profits, and the excess duty on that might have made this large figure of £126,014 infinitesimal. I heard nothing in the argument before us to show any valid reason why the sums charged for income tax in the years 1919, 1920, and 1921 were not properly charged. The sales were of course entered in the books, taken into account, in the annual stock-taking. I was told these were infinitesimal. The duty upon them amounted only to £57,771.

I have gone further into the matter than I intended. My main reason for giving a judgment was that I may say a word or two on a more human matter.

This company has a great reputation for probity and fair dealing, for considerateness to those employed, and even more for a high sense of public duty. The figures would, if unexplained, tend to show that the company were to be included in the class of profiteers. The public discussion has shown that beyond all controversy they are as far removed from such a class as well could be. Nothing could be further from the conduct of a profiteer that the conduct of this company throughout. They heartily concurred in the efforts of the Government to alleviate the trouble caused by the shortage of food. They gave their stock. They refrained from entering the market when the Government suggested that their buying might affect prices. The magnitude of their transactions is what causes the figures to be high. These gains were forced upon the company. Though a sale is a sale, whether entered upon voluntarily or under compulsion, and though it is a sale, whether of raw material or of a finished product, it is to be borne in mind that this company never had sold barley in the raw, did not take advantage of the shortage, had the sale forced upon them, and would have made even greater gains if they had been permitted to carry on their trade as usual.

It is to be borne in mind on the other hand that the Government gained nothing by the transaction. The excise duty of this company cannot be infinitesimal. The Government lost that source of revenue. The transaction was for the public weal, and this company loyally co-operated with the executive in relieving the shortage of food caused by the war. Notwithstanding all, and in spite of themselves, their profits exceed pre-war profits, and the excess duty is payable thereon.

C. N. K.

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June 18, 19. July 17.

Messrs. Guinness, Son, & Co., Ltd., appealed to the Court of Appeal (I.F.S.) (1).

Wilson K.C. and *FitzGibbon K.C.* (with them *Phelps*), for the appellants :—

By sect. 1 of the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), it is provided that where any Act enacts that income tax shall be charged for any year at any rate the tax shall be charged in respect of all property, profits, or gains respectively described or comprised in the schedules A, B, C, D, and E contained in the first schedule to the Act. Schedule D of the Act, sect. 1 (*a*) (ii), enacts that tax shall be charged in respect of the annual profits or gains arising or accruing "to any person residing in the

(1) Before O'CONNOR M.R., RONAN L.J., and PIM J.

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United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere''; and by sect. 2 of Schedule D tax under that schedule shall be charged under the following cases respectively, that is to say:—''Case 1: Tax in respect of any trade not contained in any other schedule ...''; and by the rules applicable to Schedule D, Case 1, the tax ''shall extend to every trade carried on in the United Kingdom or elsewhere, other than a trade relating to lands . . . directed to be charged under Schedule A.'' Sect. 38, sub-s. 1, of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), which creates excess profits duty, enacts that there shall be charged, levied, and paid ''on the amount by which the profits arising from any trade or business to which this Part of this Act applies . . . exceeded, by more than two hundred pounds, the pre-war standard of profits ... a duty ... of an amount equal to fifty per cent. of that excess.'' Sect. 40 of the same Act, sub-s. 1, provides that the profits arising from any trade or business ''to which this Part of this Act applies shall be separately determined for the purpose of this Part of this Act, but shall be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax,'' subject to certain modifications. Consequently, by virtue of sect. 40 of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), excess profits duty and income tax are to be determined ''on the same principles.''

Sect. 35, sub-s. 1, of the Finance Act, 1918 (8 & 9 Geo. 5, c. 15), provides that ''for the purposes of excess profits duty the profits arising from the sale at any time after the 22nd April, nineteen hundred and eighteen, otherwise than in the ordinary course of trade, of the trading stock or part of the trading stock belonging or formerly belonging to any trade or business, shall be deemed to be profits arising from a trade or business ...'' The corollary or inference from this section is that any such sales which took place prior to the 22nd April, 1918, are not profits arising from a trade or business, and in truth and in fact they are not ''arising from a trade or business,'' but are made so as and from the 22nd April, 1918, by a statutory fiction introduced by the word ''deemed.'' The section thus interprets or declares the existing law as to such profits. This is made abundantly clear by sect. 31 of the same Act, which, by the use of the word ''only,'' shows that but for the statutory fiction contained in sect. 35, such profits would not be liable to excess profits duty. The result is that sect. 35 in effect eliminates from the consideration of the carrying on of a business or trade all sales of trading stock made otherwise than in the ordinary course of trade. It follows that if prior to 22nd April, 1918, stock-in-trade, which includes ''raw material,'' is sold otherwise than in the ordinary course of trade, the profits arising from such sale are liable to neither excess profits duty nor to income tax, as income tax and excess profits duty are put on the same basis by sect. 40 of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89).

S. L. Brown K.C. and *Timothy Sullivan K.C.* (with them *G. W. Shannon*), for the respondents:—

We submit that the profits in question form part of the annual profits or gains arising from the trade or business carried on by the appellants, and are chargeable to income tax and excess profits duty. By the Barley Requisition Orders, 1917 and 1918, an average price was fixed. The transaction was a sale, and the so-called compensation was the purchase price. The answer to the question raised on this appeal must depend to a large extent on what in fact was the nature of the transaction which resulted in the profit which has been taxed in this case. The Commissioners have found that it was in fact a sale. It was a compulsory sale, perhaps, but still a sale. The only difference between the sales in this case and any other case is that they were compulsory. When the Barley Orders and the other documents in the case are examined, it will be seen that there was an embargo put on the stocks of barley. Messrs. Guinness were not to sell it as stout. They were prevented from dealing with it except on the direction of the Food Controller. But that did not deprive Messrs. Guinness of their profit from it. The property remained in Messrs. Guinness. In the whole course of the correspondence between the Food Controller and Messrs. Guinness, except in one instance, the word "price," and not "compensation," is used. "Price" is the proper term, and no deduction ought to be made in the particular instance from the use of the word "compensation." The Commissioners have found as a fact that the transaction was a sale of the barley, and there being evidence to support that finding, it ought not to be disturbed.

Wilson K.C. (in reply):—What the Commissioners found was "that the profits arising from the sale of barley by the appellants to or under the instructions of the (British) Government formed part of the annual profits or gains arising from the trade or business carried on by the appellants, and fall to be included in the computation of the appellants' profits for the purpose of income tax and excess profits duty." There was no evidence to justify that finding. It is the element of compulsion that makes all the difference in this case. There was no compulsion in the *Mullingar Case* (1).

Authorities cited and discussed:—*Mullingar Rural District Council* v. *Rowles* (1); *Scottish Provident Institution* v. *Farmer* (2); *Gresham Life Assurance Society* v. *Styles* (3); *In re Spanish Prospecting Co., Ltd.* (4); *The Glenboig Union Fireclay Co., Ltd.*, v. *The Commissioners of Inland Revenue* (5); *Benyon & Co., Ltd.*, v. *Ogg (Surveyor of Taxes)* (6); *The*

(1) [1913] 2 I. R. 44.
(2) 6 Tax Cases, 34.
(3) [1892] A. C. 309.
(4) [1911] 1 Ch. D. 92.
(5) Unreported.
(6) 7 Tax Cases, 125.

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Hudson's Bay Co., Ltd., v. *Stevens (Surveyor of Taxes)* (1); *Tebrau (Johore) Rubber Syndicate, Ltd.*, v. *Farmer (Surveyor of Taxes)* (2); *Humphrey* v. *Peare* (3); *Cope Brandy Syndicate* v. *Inland Revenue Commissioners* (4); *O'Kane* v. *Commissioners of Inland Revenue* (5); *The Gramophone and Typewriter, Ltd.*, v. *Stanley* (6); *Farmer* v. *Cotton's Trustees* (7); *Ex parte Walton, In re Levy* (8).

O'CONNOR M.R. :—

This is an appeal by Messrs. A. Guinness, Son, & Co., Ltd., the well-known brewers, from a judgment of the King's Bench Division upholding an assessment of income tax and excess profits duty in respect of very unusual transactions.

There is only one question involved, and that is whether certain profits arising from what has been described as the sale of barley, but which, for the present, I prefer to give the neutral description of transactions in barley, ought to be treated as profits arising out of a trade or business so as to be liable to assessment for income tax and excess profits duty.

It must be clearly understood that the claim of the Commissioners is made in respect of profits arising out of a trade or business, and not under any other head. I suggested during the argument that possibly the claim might be sustained by bringing it under some other head than that of trade or business, but this was disclaimed; and I must treat the claim as made solely under Case 1 of Schedule D of the Income Tax Act, 1918, which is practically the same as Case 1 of Schedule D of the Act of 1842. Indeed, the case stated by the Commissioners is confined to profits arising from a trade or business.

The appellants are a company incorporated under the Companies Acts; and under their memorandum have power to carry on the trade or business of brewers, distillers, wine, spirit, and aerated and mineral and other waters manufacturers, and merchants, maltsters, hop merchants, and licensed victuallers, and any other business incidental to or arising out of or which can be conveniently carried on in conjunction with such businesses, or any of them. They have also power to manufacture any articles or things used for or in connexion with the company's business, and to buy, sell, and deal in same. For use in the manufacture of stout they habitually purchase and hold large stocks of barley, which they use solely as raw material for the manufacture of stout. They have never sold any barley, unless the transactions which are involved in the present case can be called sales. During the late war, owing to the shortage of materials for making bread, the Government put in

(1) 5 Tax Cases, 424.
(2) 5 Tax Cases, 658.
(3) [1913] 2 I. R. 462.
(4) [1921] 1 K. B. 64.
(5) 56 I. L. T. R. 25.
(6) [1908] 2 K. B. 89.
(7) [1915] A. C. 923.
(8) 17 Ch. D. 746, at p. 756.

force its powers under the Defence of the Realm Act, and requisitioned the appellants' stocks of barley. This was done under certain statutory rules and orders; and in order that there may be a clear conception of the legal bearing of the acts done under their authority, it is necessary to refer to them particularly. By the Barley (Requisition) Order, 1917, it was ordered that all persons owning or having power to sell or dispose of any barley, with the exception of certain home-grown barley, should place such barley at the disposal of the Food Controller, and deliver the same to him, or such persons as should be named by him, in such quantities and at such times as the Food Controller might from time to time require; that pending any direction, no person should remove or otherwise dispose of any such barley, whether in pursuance of a contract existing at the date of the order or not, and all persons concerned should take such steps as might be reasonably necessary to maintain the same in good condition; and that all persons owning or having power to sell or dispose of such barley should give particulars thereof on prescribed forms to the Food Controller.

It was further stated by the order that the Food Controller would subsequently communicate to the owners of barley taken over by him the prices which he would be prepared to pay for the same, and that the compensation in default of agreement would be fixed by an arbitrator to be appointed by the Lord Chief Justice of England. Penalties were imposed on persons acting in contravention of the order. In compliance with this order, the appellants, on the 30th April, 1917, gave the particulars required, and on the 18th May, 1917, the Royal Commission on Wheat Supplies wrote to them, informing them that the Food Controller had fixed certain prices, which were mentioned, for the barley which had been requisitioned under the order I have stated. The letter also stated that a further charge of 2d. per quarter of 448 lbs. would be allowed per week for rent, insurance, interest, and care of barley as from April 16th, 1917; that delivery should be made as required by the Royal Commission, and that payment would be made by net cash seven days after delivery. This was followed by a further letter from the Royal Commission, dated 29th May, 1917, instructing the appellants to sell on behalf of the Commission certain barley to millers at 2s. 6d. per 448 lbs. over the taking-over price, less one per cent. for the appellants' commission and risk of del credere. A further Barley (Requisition) Order was made on the 26th February, 1918, which was followed by further requisitions on the appellants. They are in substance on the same lines as those made in 1917. The appellants complied with the orders and requisitions. The result was that the compensation paid by the Royal Commission on Wheat Supplies, together with commission and other allowances, showed balances in favour of the appellants after deducting the original prices paid by them for the barley taken over and disposed of under orders.

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Now, I ask myself, what was the nature of the transactions? The barley was purchased by the appellants in the ordinary course of trade for the purposes of their business. This was, no doubt, a trading transaction. But then the Government steps in, and by virtue of its authority compulsorily appropriates it—no doubt on the terms that the appellants are to be compensated. From that moment the appellants ceased in reality to be the owners. They could not use it for the purposes of their trade. They could not themselves dispose of it for any purpose. They were compelled to hold it as mere warehousemen for the Royal Commission, and deliver it on their behalf and under their orders. In effect the Government said to the appellants, "No doubt you have purchased this barley for the purposes of your trade, but you shall not trade with it"; and the appellants were bound to submit. Surely that was not in the course of their trade or business. Nor could it be, because, so far from trading in their barley, they were warned under penalties not to do so. Looking at the transaction in this way, which seems to be the only true way, I fail to see how any subsequent dealing in the barley in question could have produced a profit in the trade or business of the appellants. The barley had in fact been subtracted from their stock-in-trade the moment the requisition was made.

It has been suggested that the profit assessed arose out of sales to the several millers to whom the barley was delivered under orders. But if there is one thing clear in this case, the sales to the millers were not sales by the appellants. They were sales by the Royal Commission on Wheat Supplies, through the compulsory agency of the appellants. The orders and requisitions make this indisputable. They are so clear that I need not refer to them again. No doubt the transactions showed an immediate profit, no matter what may have been the indirect loss. But, again, I say it was not in the course of the appellants' trade. It was not even a trading transaction by the appellants. The trade for which the barley was stocked had been summarily put an end to, and the appellants had ceased to own the barley. The respondents relied on the memorandum of association of the appellants. They referred to it for the purpose of showing that the company had power to sell the barley, and that the transactions were therefore intra vires. So far as I can understand the reference to the memorandum, it was intended to prove that anything done under its authority must be taken to have been done for the purposes of the appellants' trade. But what transactions or what part of the transactions were done under the memorandum? Was it the taking over by the Government for a compensation to be measured by the prices fixed? Surely not, because this was the act of the Government—an external party—moving by virtue of an over-riding authority. Was it the sales to the millers? Again I say no, because these were not sales by the appellants, but sales by the Royal Commission,

carried out by the over-riding authority conferred by the orders. Prima facie things done by a company under the authority of the memorandum are done for the main purpose of the venture of the company; but here we have things done, not by the company, but by an external party, in no privity with the memorandum, and acting, not under it, but in total disregard of it.

In my opinion the argument based on acts intra vires has no bearing on the case. If the appellants sold voluntarily to the Government or to millers or other persons, that would have been an act of the company intra vires, and prima facie in the course of their trade. But there was no sale by the company. The barley was taken per force by the Government, and the company submitted. The Government subsequently sold, and the company under compulsion had to act as Government agents. For these reasons I am of opinion that any profits arising out of the transactions in question were not profits arising out of the trade or business of the appellants, and were not assessable for income tax or excess profits duty. But it would not be right in dealing with this important case to leave it without reference to the judgments of the learned Judges of the King's Bench Division and to the authorities cited. The judgment of the Lord Chief Justice was based principally upon the case of the *Mullingar Rural District Council* v. *Rowles* (1). But there is an essential difference between that case and the present. There the acts which were held to have constituted the trading by the Mullingar Rural District Council were the acts of the council done by them in pursuance of a statutory authority enabling them to sell water. No doubt in the exercise of their powers they were subject to restrictions and under legal obligations to supply certain persons. Their trade was in the supply of water for money payments. They were the sellers. Their customers were the buyers. That was not merely their ordinary trade, but their only trade, and their profits arose out of this trade. No doubt there was an element of compulsion, but the compulsion was only this—that in the exercise of their statutory powers to construct waterworks and to supply water at a profit within a certain district they were under an obligation to supply persons in the district at certain rates. It was a trading under obligations, but it was none the less the trading of the District Council acting under statutory authority. It was not a case like the present one, in which the statutory authority of the traders to trade in their own goods was held up, their goods taken from them, and applied by an extern party to purposes foreign to their trade.

The Glenboig Union Fireclay Co., Ltd., v. *The Commissioners of Inland Revenue* (2) was referred to for the purpose of distinguishing it from the present one, but in my opinion there is no material distinction. The company were manufacturers of fire-

(1) [1913] 2 I. R. 44. (2) Not yet reported.

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clay goods and merchants of raw fireclay. They had mining rights over certain beds of fireclay which they worked. These beds were in proximity to a railway, and the railway company, for the protection of their line and in exercise of their statutory power, prevented the fireclay company from further working the beds. The fireclay company got compensation from the railway company for this interference. The amount of this compensation was returned by the fireclay company as a trade profit, and it was assessed for income tax, which was paid. In a subsequent year, when excess profits duty became payable, the Inland Revenue, in order to increase the amount of the excess profits, disputed that the sum paid by the railway company for a previous year was a trade profit. This was done for the obvious purpose of decreasing the profits of the previous year and correspondingly increasing the excess profits of the subsequent year. It was held by the House of Lords that the compensation was not an item of trade profits. The reason for this decision seems to me to be put very clearly and very simply by Lord Wrenbury. He says: "Was that compensation profit? The answer may be supplied, I think, by the answer to the following question: Is a sum profit which is paid to an owner of property on the terms that he shall not use his property so as to make a profit? This answer must be in the negative. The whole point is that he is not to make a profit, and is paid for abstaining from seeking to make a profit." I could not, after seeking for the aptest words, find language which would more accurately apply to the transactions between the Royal Commission on Wheat Supplies and Messrs. Guinness. The subsequent part of Lord Wrenbury's judgment is equally clear and decisive. He says: "The matter may be regarded from another point of view—the right to work the area in which the working was to be abandoned was part of the capital asset, consisting of the right to the whole area demised. Had the abandonment extended to the whole area, all subsequent profit of working would of course have been impossible, but it would be impossible to contend that the compensation would be other than capital. It was the price paid for sterilizing the asset from which otherwise profit might have been obtained. What is true of the whole must be equally true of part." Now, apply that to the present case. The barley taken over was a capital asset. That asset was sterilized as a profit-making material. If, instead of merely taking the barley, the Government took over the entire concern—the cooperage, the vats, the coal, the machinery, the drays, the horses, the motors, the premises, everything—for war purposes, surely the compensation payable therefor could not be called a profit made in the course of trade or business. I say with Lord Wrenbury: "What is true of the whole must be equally true of the part."

I do not think it necessary to deal with the other cases cited. They are beside the question on which this case turns: was the subtraction under compulsion of a capital asset of the appellants

a trade dealing by them, and was the compensation paid to them a profit made by them in the course of their trade and business? I have not dealt separately with the branch of the case which is concerned with excess profits duty, because once I arrived at the conclusion that the compensation money paid for the barley was not a trade profit, the claim for excess profits duty fell with the claim for income tax.

In my opinion the appeal should be allowed.

RONAN L.J.* :—

I am of the same opinion; and I really feel that I ought to apologise for delivering a separate judgment after what I take the liberty of describing as the masterly judgment of the Master of the Rolls, to which we have just listened. That judgment appears to me to cover the whole case; but in similar circumstances Lord Justice FitzGibbon said that in important cases it was the practice of the Court for each member of it to deliver separate judgments. In this case, as this Court disagrees with the King's Bench Divisional Court, and as I am aware my respected colleague, Mr. Justice Pim, takes a different view from that of the majority of this Court, I will in my own language give the reasons for my decision, which I feel will be but a feeble repetition of what the Master of the Rolls has said.

The decision we have to deal with is contained in the eleventh, twelfth, and thirteenth paragraphs of the case stated. [The Lord Justice read these paragraphs, and proceeded :—] The first thing I gather from that is that the Commissioners treat the excess profits duty and the income tax questions as identical. Excess profits duty is imposed by sect. 38 of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), which enacts by the first subsection that "there shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this Part of the Act applies . . . exceeded, by more than two hundred pounds, the pre-war standard of profits as defined for the purposes of this Part of this Act, a duty (in this Act referred to as 'excess profits duty') of an amount equal to fifty per cent. of that excess." The words are not "profits on sales" or "profits in the ordinary course of trade," but simply "profits arising from any trade or business." Sect. 40 says: "The profits arising from any trade or business to which this Part of this Act applies shall be separately determined for the purpose of this Part of this Act, but shall be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the first part of the fourth schedule to this Act and to any other provisions of this Act."

* This judgment has not been revised by Ronan L.J.

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Schedule D of the Income Tax Act, 1918, sect. 1, provides that the tax under that schedule shall be charged in respect of (*a*) the annual profits or gains arising or accruing (i) to any person residing in the United Kingdom from any kind of property whatever wheresoever situate in the United Kingdom or elsewhere, and (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere, and (iii) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession, employment, or vocation exercised within the United Kingdom; and (*b*) all interest of money, annuities, and other annual profits or gains not charged under Schedule A, B, C, or E, and not specially exempted from tax." Now it is quite plain that the only portion of that provision applicable is (*a*) (ii): "to any person"—including a corporation—"residing in the United Kingdom from any trade." Mr. Wilson founded an interesting argument on sect. 35 of the Finance Act, 1918. Sect. 35, sub-s. 1, provides: "For the purposes of excess profits duty the profits arising from the sale at any time after the 22nd day of April, nineteen hundred and eighteen, otherwise than in the ordinary course of trade, of the trading stock or part of the trading stock belonging or formerly belonging to any trade or business, shall be deemed to be profits arising from a trade or business . . ." That is, that something which is not profits shall be deemed to be profits. There is nothing corresponding to that in the Income Tax Act, but it is worthy of notice that the expression "trading stock" in that section includes raw materials.

Let us take the words "from any trade." What does "trade" mean? Speaking generally, trade, or rather traders, may be divided into two classes—distributors and manufacturers. A distributor buys, and he subsequently sells. The excess of the selling over the buying price, minus the cost of carrying the article, is the profit, and the profit is derived from the seller's act of selling. He selects the place, the time, the quantity, the person from whom he buys, and the person to whom he sells, and in both cases he has an absolute veto over the prices. I do not say he can fix the prices, but the prices cannot be fixed without his assent. The only difference between the distributor and the manufacturer is that the distributor sells the article as he buys it; the manufacturer converts it into something else and sells it in the same way. But the profit comes from the joint operation of the two sales—the sale to him and the sale by him; and these two things are essential to the profit. To my mind the entire fallacy in the judgments of the King's Bench Division, as was pointed out by the Master of the Rolls, is this: that whereas Messrs. Guinness, Son, & Co. did buy this barley, they never sold it. It is absurd to contend that a sale by an agent on behalf of a principal is a sale by the agent on behalf of himself. That is

really what the argument means. If a person, be he distributor or manufacturer, purchases an article and it is taken from him, in the case of the manufacturer, before he manufactures it into the finished product, or, in the case of the distributor, before he sells it, the trading is stopped. Profit—the part of Hamlet—is out of it. What makes the profit is the subsequent sale by him, and when that is taken from him it entirely, or pro tanto, stops the trading, and prevents any profit being made.

The Master of the Rolls has said that the documents in this case are too plain for argument. He does not think it necessary to go into them in detail. I agree that they are absolutely plain; but having regard to the difference of opinion amongst the members of the Court, I think it right to examine them minutely. The first document in the case is the Barley (Requisition) Order of the 16th April, 1917. The date is not unimportant. It is not suggested that every part of it is not intra vires and binding. What is its effect on the owner of barley? The Order says: "All persons owning or having power to sell or dispose of any barley (other than home-grown barley which has not been kiln dried) shall place such barley at the disposal of the Food Controller, and shall deliver the same to him, or such persons as may be named by him, in such quantities and at such times as the Food Controller may from time to time require. Pending any direction, no person shall remove or otherwise dispose of any such barley (whether in pursuance of a contract existing at the date of this order or not), and all persons concerned shall take such steps as may be reasonably necessary to maintain the same in good condition." Then there is a clause requiring all these people to furnish particulars to the Food Controller: "All persons owning or having power to sell or dispose of such barley shall, on or before the 30th April, 1917, furnish to the Food Controller, Grosvenor House, Upper Grosvenor Street, London, W. 1, a statement on forms to be obtained from the Food Controller, giving particulars of all such barley in their possession or under their control at the date of this order, and of all their existing contracts, if any, for the sale of such barley." And: "The Food Controller will subsequently communicate to the owners of barley taken over by him the prices which he will be prepared to pay for the same. The arbitrator to determine in default of agreement the compensation to be paid for barley requisitioned under this order shall be appointed by the Lord Chief Justice of England. This order shall not apply (*a*) to persons who do not own more than 25 qrs. (448 lbs. per quarter) of barley at the date of the order; (*b*) to barley in the hands of or held to the order of flour millers at the date of this order; (*c*) to barley agreed to be sold to the Royal Commission on the Wheat Supply. If any person acts in contravention of this order, or aids or abets any other person in doing anything in contravention of this order, that person is guilty of a summary offence against the Defence of the Realm Regulations, and if such person is a company every director and officer of the

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company is also guilty of a summary offence against these regulations unless he proves that the contravention took place without his knowledge or consent."

The main argument of Mr. Brown was that after that order Messrs. Guinness & Co. remained the owners of the barley, and were trading with it, and sold it. Mr. Brown used the word "embargo," but argued that the order had no operation in transferring ownership. It removed every right of the owner from Messrs. Guinness & Co., and transferred every right of ownership from Messrs. Guinness & Co. to the Crown just as completely as in the case of taking lands under the Lands Clauses Act. In order to assure myself of this, I asked Mr. Sullivan was not ownership a bundle of rights, and, if so, what right of ownership was left to Messrs. Guinness & Co. after the order of the 16th April, 1917, was served on them? He said he could not point out any right that remained. What is "ownership"? Austin describes it as a right "over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration." Had they not every one of these? "Various attempts have been made," says Holland in his Jurisprudence, 8th ed., p. 181, "to enumerate the attributes or powers of an owner. He is said to have rights 'utendi,' 'fruendi,' 'abutendi,' 'fructus percipiendi,' 'possidendi,' 'alienandi,' and 'vindicandi.' But what has to be said with reference to the orbit, or contents, of the right of ownership may be conveniently arranged under the three heads of possession, enjoyment, and disposition." The rights of possession, enjoyment, and disposition are the important rights, and every one of these is taken from Messrs. Guinness & Co. by the mere service of this order. I entirely agree with the Master of the Rolls that so long as the Order remained it was impossible for Messrs. Guinness & Co. to trade with or make a profit out of the barley. But this document does not stand alone. It states that "the Food Controller will subsequently communicate to the owners of barley taken over by him the prices which he will be prepared to pay for the same," that an arbitrator will determine in default of agreement the compensation to be paid for barley requisitioned under the order, and that an arbitrator shall be appointed by the Lord Chief Justice of England.

Then we have a series of documents furnished by Messrs. Guinness & Co. describing all the barley they had. There is first the letter of the 30th April, 1917, from Messrs. Guinness & Co. to the Secretary, Ministry of Food, in which they say: "In accordance with the Barley (Requisition) Order, 1917, dated April 16, 1917, No. 364, we now enclose the returns of all the barley owned by us on that date." On the 18th May, 1917, the Director of Contracts writes to Messrs. Guinness: "I am directed by the Royal Commission on Wheat Supplies to inform you that the Food Controller has fixed the following prices"—he speaks of the following prices—"for the barley requisitioned

under Order No. 364"—that is to say, for the barley he has taken. The letter sets out the prices, and says: "If cleaned, screened, and graded, a further 3s. per 448 lbs. can be added to above price if sample approved. A further charge of 2d. per quarter of 448 lbs. shall be allowed per week for rent, insurance, interest, and care of barley as from April 16th, 1917"—that is, from the date of the Requisition Order. It is absurd to contend that Messrs. Guinness were to be paid rent for keeping their own barley. Rent, insurance, and interest are to be paid to Messrs. Guinness as from the 16th April 1917, and still it is contended that it remains Messrs. Guinness's barley. The letter goes on: "Original owners to be held responsible for all barley being preserved in sweet, sound, and good condition, and any indication of the development of any latent defect shall be immediately notified to the Royal Commission on Wheat Supplies and instructions asked for. Delivery to be made as required by the Royal Commission on Wheat Supplies. Payment by net cash seven days after delivery."

The next document is from the Director of Contracts to Messrs. Guinness, and is as follows: "I am directed by the Royal Commission on Wheat Supplies to instruct you to sell on behalf of the Commission"—not on their own behalf as traders—"1,450 qrs. No. 3 Canada Western barley taken over from you at 81s. per 448 lbs. ex-store Messrs. Plunkett Bros., Island Bridge, Dublin. The barley to be sold at 2s. 6d. per 448 lbs. over the taking-over price, less one per cent. for your commission and risk of del credere."—Surely that is not a sale by Messrs. Guinness on their own account.—"Payment, net cash within seven days of date of sale. The barley to be sold to millers for human consumption, to be used as substitutes only, and not for straight barley meal or flour. Sales when effected to be advised to this Commission on enclosed forms. Difference accounts, together with cheque in settlement, to be rendered to the Royal Commission on Wheat Supplies within seven days of date of sale."

The plain inference from the documents is that the barley is taken over at a certain price; certain liabilities are thrown on the original or former owners. Certain sales are directed to be made at a certain price, but Messrs. Guinness had no voice in these sales. They were simply compelled to act as agents; that is emphasised by making them del credere agents. As the Master of the Rolls has said, Messrs. Guinness became mere warehousemen of this barley, with the additional duty cast on them which is not usually cast on warehousemen. A warehouseman is bound to deliver to the real owner. He gets rent. He is not bound to make sales as a del credere agent, or to make sales at all. The extraordinary thing about this case is that both the Commissioners and the Court below have overlooked altogether the effect of the Requisition Order; and Mr. Brown's argument was based entirely on this: that the sales by Messrs. Guinness were sales of their own property as traders. If he were right in that, the

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decision of the Court below would be right, but his argument ignores the effect of the order.

I agree entirely with everything that has fallen from the Master of the Rolls, including his view of the *Glenboig Case* (1); and in my opinion the appeal ought to be allowed.

PIM J.:—

I regret I am unable to agree with my colleagues.

In the spring of 1917 the condition of the food-supply of the then United Kingdom had become desperately critical. On April the 16th of that year the Food Controller issued an order under Regulations 2 F and 20 of the Defence of the Realm Regulations. It was addressed to all persons owning or having power to sell or dispose of any barley (other than home-grown barley), and ordered that no person should remove or otherwise dispose of any barley in his possession, but should hold the same at the disposal of the Food Controller, and should deliver the same to him, or to such person or persons as might be named by him, in such quantities and at such times as he (the Food Controller) might from time to time require. The order further directed all holders of barley to take all such steps as might be reasonably necessary to maintain the same in good condition, and to send in to him (the Food Controller) on or before the 30th April, 1917, a statement giving particulars of all barley in their possession. The order then stated that the Food Controller would subsequently communicate to the owners of the barley taken over by him the prices which he would be prepared to pay for the same, and that, in default of agreement with him, the compensation to be paid should be determined by an arbitrator to be appointed (in Ireland) by the Lord Chief Justice of Ireland. In consequence of this order the appellants sent in particulars of all the barley (other than home-grown) held by them. The total quantity so returned amounted to 196,555 quarters. On the 18th of May, 1917, the Food Controller sent to the appellants a list of the prices which he was prepared to give per quarter for the various kinds of barley in their possession, and this document contained a statement that a charge of 2d. per quarter should be allowed per week for rent, insurance, interest, and care of the barley as from the 16th of April, 1917. On receipt of the letter of the 18th of May, 1917, the appellants at once accepted the prices offered by the Food Controller. From the 16th April, 1917, on, during the next ensuing few months, the Food Controller from time to time instructed the appellants to deliver to named milling firms certain quantities of barley, in said instructions specified. The barley was sold to the purchasers at 2s. 6d. per quarter over the price given by the Government, but the appellants were declared entitled to deduct one per cent. from the

(1) Unreported.

full price for their commission and risk of del credere. The course of procedure was as follows:—The purchasers of the barley paid the appellants; the appellants rendered accounts to the Royal Commission on Food Supplies, setting out the prices which the Controller had agreed to pay, and adding thereto the various sums for rent, insurance, and commission which they were entitled to charge. Apparently in some cases small sums were credited and paid to the Government, but on the whole the additional 2s. 6d. paid by the purchasers seems to have done little more than cover the claims, other than the price, to which the appellants were entitled.

Out of the 196,555 quarters of non-home-grown barley in their possession, the appellants delivered, in compliance with instructions from the Food Controller, 163,313 quarters of barley. A balance of 33,242 quarters remained in their possession, and was presumably used by them later on in their business. On those various sales the appellants made a profit of £153,744. In reply to a request made to them by the Commission on Wheat Supplies in January, 1918, the appellants provided a further amount of 16,288 quarters of barley, and made a further profit of £4,260.

By a further order dated the 26th day of February, 1918, the Food Controller requisitioned all the home-grown barley held by persons in the United Kingdom. They subsequently, on the 1st of March, wrote to each holder of barley, saying that the price of barley, home-grown and imported, should in each case be based on the certified average (if by rail to the holder's station, or if by barge to the holder's wharf) of all barley purchased by him during the season 1917–18, plus two months' interest at 6 per cent. per annum, and a charge of 1s. 6d. per quarter was allowed for the handling of the barley, which was delivered in pursuance of the orders of the Royal Commission on Wheat Supplies. Under this order supplies of home-grown barley were provided, and a further profit of £306 was made. The total profit amounted to £158,310.

There was a good deal of discussion during the course of the case as to the exact legal effect of these various documents. It was suggested that, inasmuch as all rights to the barley were taken away from the holders by the Food Controller, the appellants must be held, from the date of the two orders respectively, to have been no longer the owners of the barley thereby affected, and that in each case the order transferred the property in the barley to the Government. It was also argued that, as from the date of the orders, the appellants became warehousemen for the Government; and indeed the fact that rent was paid for keeping the barley, that a direction was given that the barley was to be maintained in good condition, and that money was paid to the holders for commission and risk of del credere, make the contention that the property had passed into the Government a very powerful one. On the other hand, it was argued, not

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without a show of logic, that no property passed to the Government until the Food Controller gave a specific order for delivery, and then only to the extent of the barley to be delivered. It is a nice question of law; but as I do not think it affects the real question to be decided in this case, I do not intend to pursue it further, except to say that, to whomsoever the sales were made, I cannot agree that there were no sales to anyone.

It was next alleged that the sums offered by the Food Controller in payment for the barley, and accepted by the appellants, are to be regarded as compensation and not as a price. I think that contention entirely fails. We were not told how the prices were arrived at under the order of April the 16th, 1917, but I have no doubt that they were fixed by some method similar to that employed in arriving at the prices to be paid under the order of February the 26th, 1918. The sums could not have been regarded as compensation, for, in order to arrive at any real compensation, the Food Controller would have found it necessary to inquire into the loss, if any, which the appellants would sustain by selling the barley as barley instead of selling their product of manufacture, of which the barley was the raw material. The price paid by the Government was, as I have shown, slightly under the price paid by the millers. That in itself is sufficient to show that a price and not compensation was offered and accepted.

The Inland Revenue, having ascertained that the appellants made a large profit out of the sale of the barley, sought to charge them, both with income tax and with excess profits duty. So far as this case is concerned, the two claims stand on the same basis, and I will treat of them together. The appellants objected to pay, and on the 21st of November, 1921, an appeal by them was heard by the Special Commissioners for the purposes of the Income Tax Acts. The Commissioners, having considered the evidence and the arguments put before them, found that the profits arising from the sale of the barley by the appellants, to or under the instructions of the Government, formed part of the annual profits or gains arising from the trade or business carried on by the appellants, and fell to be included in the computation of the appellants' profits for the purposes of income tax and excess profits duty, and they confirmed the assessment under appeal.

It has been suggested by Mr. Brown, on behalf of the respondents, that the finding of the Commissioners was a finding of fact, and could not be disturbed. In one sense it is a finding of fact, but to find the fact the Commissioners had to consider the evidence in the light of certain legal propositions put forward and argued. The finding was thus a finding not only of fact, but of law. I have no doubt that the appeal lies.

The appellants were assessed to income tax under sect. 2 of 16 & 17 Vict. c. 34, which enacts that the tax shall be charged in respect of the annual profits or gains arising or accruing to any

person residing in the United Kingdom in respect of the annual profits from any trade; and they were assessed to excess profits duty under Part 3 of the Finance Act (No. 2) of 1915. Sect. 40 of Part 3 enacts that the profits arising from any trade or business shall be determined for the purposes of the Act on the same principles as the profits or gains of the trade or business are or would be determined for the purposes of income tax.

The appellants contend that they do not come under these sections for several reasons, which I will take in order.

First they say: "We are manufacturers of stout, not dealers in barley. The profit, therefore, arising by this transaction does not accrue to us from our trade." Now, the words in the section are not "the trade," but "any trade." There is no doubt that the appellants have power under their articles of association to deal in barley. Up to the present time, it is true, they never have sold any barley, but circumstances might easily arise where it would be to their advantage to do so. They might desire to get rid of surplus stocks; they might be able to make a much larger profit by selling the barley than by converting it into stout; they might even in 1917 have sold barley to millers without any compulsion from the Government, in order to assist in the keeping up of the food supplies of the country. If they had, in fact, sold barley for any of these or for any other reason, can it be doubted that it would be a trade transaction, and, if a profit accrued, that it would be a profit made out of a trade carried on by them? The appellants reply, that may be so, but the sale did not take place of our own volition, but in invitum. With that I will deal later on.

Secondly, the appellants contend that this was an isolated transaction, and that an isolated transaction is not liable to taxation. There are, I admit, isolated transactions the profits of which are not liable to taxation, although large sums have accrued to the owners. The cases of *Tebrau (Johore) Rubber Syndicate, Ltd.*, v. *Farmer* (1) and *The Glenboig Union Fireclay Co., Ltd.*, v. *The Commissioners of Inland Revenue* (2) are concerned with such transactions. In those cases it was held that what was sold or sterilized was a part of the fixed capital of the company, and that the increase of price which formed the alleged profit was only an increase in the value of the fixed capital, and therefore was not income. The case of *Benyon* v. *Ogg* (3) is an instance of a purely isolated transaction the profits of which were held to be liable to income tax. I need not go into the facts of that case, but I may say that I cannot distinguish the sale with which that case was concerned from a voluntary sale of their barley by the appellants. If I am right in that, then a voluntary sale of barley by the appellants would be chargeable both with income tax and excess profits duty.

It was then contended that the sale of the barley was a sale

(1) 5 Tax Cases, 658. (2) Not yet reported. (3) 7 Tax Cases, 125.

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of the capital of the company, and that, like the *Johore Case* (1) and the *Glenboig Case* (2), any increase in the value was merely an increase in the capital value, and therefore not profit. Now, capital in all firms and companies is of two kinds. There is what is usually called the "fixed capital," which does not change year by year, and there is what is called the "floating capital," which is continually changing, and a part of which is made up of the very goods which the concern has manufactured for the purposes of sale. I have no doubt that in general the sale of the fixed, or any part of the fixed capital of a concern would be a sale of capital, and that any increase in value which could be shown would be held to be only an increase in the value of the fixed capital, and not a profit. Lord Justice Ronan referred to the lighters or steamboats belonging to the appellants, and asked, if they were sold, would any profit which could be shown to have been made on the sale be income or capital. Lighters or steamboats do not change from year to year. They may not be exactly the same as the regular fixed capital of a company, but they approximate thereto. I am not prepared to say that any profit which could be shown to arise from the sale of them would be taxable profit, but I am prepared to hold, on the authority of *Sutherland* v. *The Commissioners of Inland Revenue* (3), that, if the appellants had hired their boats to the Government, they would have been liable to be taxed on the profits made from the hiring. I am not prepared to hold that the sale of "floating capital" would come within the meaning of the decisions in the *Johore* (1) and *Glenboig* (2) *Cases.*

Now, what is "floating capital" in the light of one transaction must also be "floating capital" in the light of another similar transaction. If the appellants had themselves voluntarily sold the barley, could anybody suggest that it was a sale of their fixed capital within the meaning of the decisions in the *Johore* (1) and *Glenboig* (2) *Cases,* and that the large profits which might have accrued to them thereby were not liable to income tax or excess profits duty? The only answer to such a question is, in my opinion, "No." If the barley be not fixed capital in the hands of the company on a voluntary sale, how can it become fixed capital merely because the sale was compulsory? Is it in any real sense a sale of capital at all?

As the Master of the Rolls has largely relied on the *Glenboig Case* (2) in his judgment, I desire to say a few words about it. That was a case in which a railway company, acting under the powers given to them by the law of Scotland, prevented the Glenboig Company from working or making any use of a portion of its fixed capital "in perpetuum." The judgments of the Lords of Appeal spoke of the effect of the action of the railway company as "sterilization." The word was used merely to express the result of the action, not because it had any peculiar

(1) 5 Tax Cases, 658. (2) Not yet reported. (3) Unreported.

or esoteric meaning. If the capital had been purchased—and I cannot distinguish in law between the effect of what occurred in the *Glenboig Case* (1) and a purchase—the word "sterilization" would not have been used, for it would not have expressed the effect of the transaction. It was held that the compensation given for what had been "sterilized" was capital and not profit, and that therefore no tax was payable. My only difficulty is to understand how anybody could even have thought it to be a profit.

In this case there has been no "sterilization" and no purchase of fixed capital. There has been a compulsory purchase of floating capital, which may have diminished the company's profits or may not. We have no evidence before us. I fail to see any real analogy between the *Glenboig Case* (1) and this case. They deal with wholly different things.

Mr. Wilson addressed to us an argument on the words of sect. 35 of the Finance Act of 1918, which at the time I thought of great weight. It will be recollected that the excess profits duty is to be determined on the same principles as the profits liable to income tax were to be determined. Sect. 35, sub-s. 1, of the Act of 1918 is as follows: "For the purpose of excess profits duty, the profits arising from the sale at any time after the 22nd day of April, 1918, *otherwise than in the ordinary course of trade, of the trading stock or part of the trading stock* belonging or formerly belonging to any trade or business shall be deemed to be profits arising from the trade or business, and where any such sale takes place after a trade or business has ceased, the trade or business shall be deemed to have been carried on up to and including the date on which the sale takes place, and the accounting period shall be taken to be such as the Commissioners of Inland Revenue may determine"; and by sub-s. 5 "trading stock" includes any goods such as are sold in the ordinary course of trade or business, whether in a finished condition or not, and any raw or other materials used in the manufacture or preparation of any such goods.

Mr. Wilson argued as follows:—"Inasmuch as the profits for the purposes of excess profits duty are to be ascertained and determined on the same principles as for the purpose of assessing income tax, a sale otherwise than in the ordinary course of trade of the trading stock cannot come within either excess profits duty or income tax, for, if it were under the income tax code assessable to income tax, then there would be no need for this section. The inference therefore is that a sale 'otherwise than in the ordinary course of trade' was not liable to income tax." He added: "If that inference cannot be drawn, then the section is meaningless, unnecessary, and mere surplusage." I am not going to consider how far the section may, in fact, be meaningless, unnecessary, or mere surplusage, for I do not take the same view of the section as

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Mr. Wilson does. The words, "in the ordinary course of trade," are ambiguous. If the word "ordinary" refers to any trade transaction which is not in the ordinary course of the conduct of the particular business concerned, then, I think, it might be a little difficult to hold that a compulsory sale was made "in the ordinary course of trade." But if, on the other hand, the words simply mean that the transaction was to be a trade transaction, and not, for instance, a sale in the course of the realization of a business where the trade had been stopped, then, of course, the only matter for decision would be, was the sale of the barley an ordinary transaction of trade, even though compulsory? I have come to the conclusion that it was, apart from compulsion, an ordinary trading transaction.

We are then brought to this: is a sale which is within the powers of the seller, and for which he receives a price which he has accepted, rendered less an ordinary trade transaction because it is compulsory? If so, in this case this strange result would follow: that if the Government—and it was at one time quite possible that such an order might be made—had requisitioned the stout belonging to the appellants, and had directed them to sell at a price fixed by the Government and unchallenged by them, and to send it to the various army centres in France and other parts of the world when they received directions, then, although it was a sale of the thing which they, the appellants, had produced, and at a price to which they did not object, it was not a transaction in the ordinary course of trade, because it was compulsory. It would further follow that, although the appellants had made hundreds of thousands of pounds of profit out of such a compulsory sale, they would be liable neither to income tax nor to excess profits duty. That would appear to me to be an impossible proposition, and, unless it can be shown to be correct, it seems to afford a complete answer to the contention that a sale in every respect a proper sale, except that it was compulsory, should be held to be a sale otherwise than in the ordinary course of trade.

I desire to allude to one other matter. We have no evidence before us whether, if the barley had been turned into stout, the appellants would have made more or less profit. If they had made more, then their taxation would have been greater than it is to-day; if they had made the same profit, their taxation would be exactly as it is to-day; if they had made less, what have they suffered?

There is another matter of which I must not lose sight, though it only bears indirectly on the point at issue, and not at all on the law. The appellants, having sold this large quantity of barley to or through the Government, purchased, as against what they had sold, a similar quantity of barley. They had to pay considerably more for it than they paid for the barley sold, and they have rightly entered in their books the amount so paid as against the outgoings of the year or years during which the

money was expended. That will have the effect of decreasing considerably both the excess profits duty to which they are liable and also the income tax. The appellants cannot have it both ways. They cannot at the same time be freed from the tax on profits really earned, and also make use of the purchases as a means of cutting down the excess profits duty or income tax to which they became liable in subsequent years.

In the result I have come to the conclusion that the decision of the Special Commissioners of Income Tax was right, and that this appeal should be dismissed.

Solicitors for the appellants: *Fred Sutton & Co.*
Solicitor for the respondent: *Richard Martin.*

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an Order in Council was made transferring to it certain services theretofore controlled by the British Government, but specifically excluding control or administration of any of the existing naval, military, or air forces of the Crown. In accordance with sect. 1, sub-s. 2, of the Irish Free State (Agreement) Act, 1922, an election was held of members to constitute the House of Parliament to which the Provisional Government should be responsible. The House of Parliament, known as Dáil Éireann, so elected met for the first time on September 9th, 1922. In the meantime an armed rebellion against the authority of the Provisional Government had broken out. In order to suppress that rebellion, a National army was raised by the Provisional Government. That army, acting under a resolution passed by Dáil Éireann, established military Courts for the trial of civilians charged with the commission after October 15th, 1922, of certain offences, including attacks upon the National army, looting, arson, or having possession without proper authority of arms, ammunition, or explosives. On October 21st two ladies, Mrs. and Miss J., were arrested by members of the National army. Subsequently charges under the military regulations were formulated against them, and they were informed that it was intended to try them before a military Court. They applied for a writ of habeas corpus; also, by way of civil action, for an injunction to prevent the military authorities from proceeding with the trial before a military Court on the ground that the Provisional Government had no power to create an army; that the said military Courts were wholly illegal, and contrary to the laws and statutes of the realm; and that the resolution passed by Dáil Éireann, and the orders and proclamations issued by the Army Council pursuant thereto were illegal and ultra vires. *Held*, that an appeal lay to the Court of Appeal from the order of the King's Bench Division refusing the writ of habeas corpus. *Held* (affirming the King's Bench Division), that a state of war existed at the date of the arrests, and still exists in Southern Ireland. Per O'Connor L.J.: A military Court is not a Court in any legal sense; and there being, therefore, no "criminal cause or matter" involved, an appeal lay. *R.* (*Johnstone*) v. *O'Sullivan*
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was held up by three or four armed men, who blindfolded and removed him, and took away the car. The police had been called in from a few outlying stations; motors cars had been commandeered and not returned, and receipts given in three cases; a post-office motor cycle had been taken; there had been some raids for shotguns and for mails; and early in January, 1921, martial law was proclaimed in the county. *Held* by the House of Lords, reversing the order of the High Court of Appeal for Ireland, which confirmed an order of the Court of Appeal in Southern Ireland, refusing to set aside the judgment awarded to the plaintiff by the Lord Chief Justice of Ireland, on 25th of November, 1921, that the Courts below should have drawn the inference from the proved and admitted facts that at the time of the seizure of the motor car there was both civil commotion and riot. Per the Earl of Birkenhead: In dealing with a policy of insurance of a motor car, the relevant area within which one must ask whether or not there was disturbance or commotion is that area over which a motor car, with reasonable compass and range, may be expected to travel. He inferred from the evidence that the car was taken by men working in the interest of those who were carrying out disorder and engaged in violent courses in Ireland, and whose motive was not private gain. The circumstances were not those of a normal theft. There was an assumption of strength and of organization by the perpetrators, who acted as masters of the situation. Per Lord Wrenbury: All the elements of riot which were considered in *Field* v. *Receiver of Metropolitan Police* ([1907] 2 K.B. 853) were satisfied. The law was paralysed. The true meaning and scope of the policy was, as stated by O'Connor L.J., that where the arm of the ordinary law was paralysed by commotion or riot, the insurers were not to be liable for theft by armed men. *Motor Union Insurance Co.* v. *Boggan* ... ... H.L. 136

KING'S ENEMIES—Raiders during rebellion held to be, and carrier exempt from liability ... 102
See CARRIER.

1. LANDLORD AND TENANT — "DWELLING-HOUSE"—*House used as a temperance hotel — Recovery of possession — Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *sect.* 12, *sub-s.* 2.] Certain premises, known as 7 College Square, East, in the City of Belfast, were let to the defendant in 1917 for the term of six months from 1st August, 1917, and thereafter from quarter to quarter, at the rent of £20 per quarter, in order that the defendant might carry on the business of a temperance hotel, and were used by the defendant as a temperance hotel. The defendant, as proprietress of the hotel, resided there. In an action for recovery of possession of the premises, the defendant claimed to be entitled to retain possession on the ground that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied. Brown J. found that the premises were occupied by the defendant as her dwelling-house, although the real purpose of the letting was to carry on in them the business of a temperance hotel. He accordingly, following the decision of the English Court of Appeal in *Epsom Grand Stand Association* v. *Clarke* ([1919] W.N. 170), held that the defendant was protected by the Act, and gave judgment for the defendant. *Held* by the Court of Appeal (Moore and Andrews L.JJ.), affirming the judgment of Brown J., that the premises came within sect. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), on the ground that the hotel trading was a business of such a nature that the premises in which it was conducted never lost the character of a dwelling-house. *Burns* v. *Radcliffe* ... APP. (N.I.) 158

2. LANDLORD AND TENANT — INCREASE OF RENT—NOTICE OF INCREASE—VALIDITY — *Disputed items —Agreement between parties — Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *sect.* 2, *sub-s.* 1 (*a*) *and* (*d*); *sect.* 3, *sub-s.* 2; *First Schedule.*] A notice in writing of a landlord's intention to increase the rent of a dwelling-house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies, served by him upon the tenant, claimed increases under the four statutory heads. The tenant denied liability in respect of improvements under sect. 2, sub-s. 1 (*a*), of the Act, contending that his liability under sect. 2, sub-s. 1 (*d*), should be reduced by half because he

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was expressly bound under the tenancy to execute internal repairs. By agreement between the parties the claim under (*a*) was abandoned, and that under (*d*) was reduced by half. Upon a motion for final judgment for rent due, the tenant made the case that the notice was invalid, because the figures to which he had agreed did not correspond with the figures which were set out in the notice. *Held* (affirming the King's Bench Division), that the notice was not invalid. *Penfold* v. *Newman* ([1922] 1 K.B. 645) discussed. *Elliott* v. *Ellis*

[APP. (I.F.S.) 45

3. LANDLORD AND TENANT — RATES AND TAXES—RECTIFICATION OF LEASE — *Poor-rate — Lease at a fixed rent—Covenant that lessee is to hold premises "free of all rates, taxes, and assessments" — Local Governmeni (Ireland) Act,* 1898 (61 & 62 *Vict. c.* 37), *sect.* 52, *sub-s.* 2.] By an indenture of lease dated the 29th December, 1913, made in pursuance of a prior agreement, the lessees agreed to take from the lessor certain premises for a term of twenty-one years from the 1st September, 1913, at the yearly rent of £250. The lease contained a covenant that "the lessor shall during the said term pay and discharge all rates, taxes, assessments, and outgoings of every nature and kind payable out of or in respect of said premises and lands, it being the true intent and meaning hereof that the lessees shall . . . hold the said premises . . . free of all rates, taxes, and assessments . . . on payment of said reserved yearly rent of £250." In an action for one year's rent brought by the plaintiff, the defendants claimed to have paid £62 8s. 8d. in respect of rates, and brought the balance of the year's rent, £187 11s. 4d., into Court in satisfaction of the plaintiff's claim. In the alternative the defendants claimed to set off £62 8s. 8d. against the plaintiff's claim on foot of the plaintiff's covenant to indemnify them against rates, and also counterclaimed to have the lease rectified by making it embody the alleged agreement, or otherwise cancelled. *Held,* by the High Court of Appeal, affirming the decision of the Court of Appeal in Southern Ireland and the judgment of Gordon J., that the Court cannot rectify or cancel a deed or agreement because its terms operate differently from what the parties intended owing to their

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mistake as to the general law applicable to the transaction. Rectification is only applicable to a case in which there is an agreement and a subsequent failure to express it as made. *Jackson* v. *Stopford*

[GORDON J. 1
[APP. (I.F.S.); H.C.A.I. 7

LICENCE DUTY — MECHANICALLY PROPELLED VEHICLE — *Failure to pay licence duty—Authority to prosecute —Finance Act,* 1920 (10 & 11 *Geo.* 5, *c.* 18), *sect.* 13; *Roads Act,* 1920 (10 & 11 *Geo.* 5, *c.* 72), *sects.* 1 *and* 13; *Roads Vehicles* (*Registration and Licensing*) *Order,* 1921; *Excise Management Act,* 1827 (7 & 8 *Geo.* 4, *c.* 53), *sects.* 65, 73; (4 & 5 *Wm.* 4, *c.* 51), *sect.* 19; *Petty Sessions Act,* 1851 (14 & 15 *Vict. c.* 93), *sect.* 42.] The respondent's motor car, which was ordinarily kept and garaged in the City of Londonderry, was, on 23rd February, 1922, used in Dungiven, the licence duty in respect of the year 1922 not having been paid. A., the appellant, was an officer duly authorized by the Londonderry County Council to issue licences pursuant to the provisions of the Road Vehicles (Registration and Licensing) Order, 1921. *Held,* that A. had the powers of an officer of Customs and Excise to prosecute in the County of Londonderry for disobedience of the said order, and that no authority from the Corporation of the City of Londonderry was necessary. *Adams* v. *M'Gill*

[K.B.D. (N.I.) 98

LICENSING ACTS—TRANSFER — EXPIRED LICENCES—*Order of Quarter Sessions—Certiorari — Licensing Act,* 1825 (6 *Geo.* 4, *c.* 81), *sect.* 11 — *Licensing* (*Ir.*) *Act,* 1902 (2 *Ed.* 7, *c.* 18), *sect.* 2.] Three adjoining houses, one licensed, one a hotel, and one a hardware shop, were burnt down. The licence was allowed to expire. Afterwards the owner rebuilt the hardware shop, and applied for and obtained from the Chairman of Quarter Sessions a transfer of the licence to the new premises. On an application for a writ of certiorari to quash the order granting the transfer: *Held* (affirming the King's Bench Division), that the writ should issue on the ground that sect. 11 of the Licensing Act, 1825 (6 Geo. 4, c. 81), authorized a transfer for the purpose of carrying on the business in premises other than those burnt or otherwise destroyed only during the period

LICENSING ACTS—*continued.*

while the licence was operative. The licence applied for would be a wholly new licence for premises not previously licensed, and absolutely prohibited by the Licensing (Ir.) Act, 1902 (2 Ed. 7, c 18), sect. 2. *R.* (*Slevin*) v. *Longford Justices* [K.B.D., App. (I.F.S.) 79, 109

1. MALICIOUS INJURY—Injury to health caused by exposure — *Kidnapping — Compensation — Criminal Injuries* (*Ireland*) *Act*, 1919 (9 *Geo.* 5, *c.* 14), *sect.* 1, *sub-s.* 1 (*b*); *Grand Jury* (*Ireland*) *Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 106 — *Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97.] A number of armed men captured the applicant within the borders of the County Fermanagh, and at once removed him to Southern Ireland, where he was detained for nine days. His general health was impaired as a result, but he suffered no objective physical injury. *Held*, that the applicant was not entitled to compensation in respect of injuries to his general health caused by exposure and the treatment to which he had been subjected. *Scarlett* v. *Fermanagh County Council* App. (N.I.) 48

2. MALICIOUS INJURY—Injury to person in Northern Ireland caused by shot fired from outside *limits of Northern Ireland — Compensation — Grand Jury* (*Ireland*) *Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 106; *Criminal Injuries* (*Ireland*) *Act*, 1919 (9 *Geo.* 5, *c.* 14), *sect.* 1, *sub-s.* 1 (*a*); *sect.* 1, *sub-s.* 2.] Applicant F., who was a private in the Tank Corps, was shot at and wounded while in the County of Fermanagh by a shot fired from the County of Donegal. The applicant applied for compensation for the wounding against the County of Fermanagh. *Held*, that the malicious injury was committed in Fermanagh, and that the applicant was entitled to recover against the County of Fermanagh. *Fermanagh County Council* v. *Farrendon* ... App. (N.I.) 180

3. MALICIOUS INJURY—*"Neighbouring counties"—Murder—Compensation — Grand Jury* (*Ireland*) *Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 140; *Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5, *sub-s.* 2—*Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *sect.* 1—*No jurisdiction to apportion compensation upon any county outside Northern Ireland.*] Applicant's husband, who was a constable in the Special Constabulary, was ambushed in County Fermanagh, near Garrison, within 200 yards of the Leitrim border. He was wounded and carried off into County Leitrim, and his dead body was afterwards found on the Leitrim side of the border. The applicant applied for compensation for the murder of her husband, and asked that the amount should be apportioned between the Counties Fermanagh and Leitrim. *Held*, that the Courts of Northern Ireland have no jurisdiction to make an order against any county in Southern Ireland as "a neighbouring county" within the meaning of sect. 140 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), and that the expression "neighbouring counties" must be taken to mean "neighbouring counties" in Northern Ireland. The jurisdictions respectively set up by the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), are mutually independent and exclusive of each other within the respective areas. *Plumb* v. *Fermanagh County Council*; *Orr* v. *County Councils of Fermanagh, Cavan, Monaghan, and Tyrone* ... App. (N.I.) 54

4. MALICIOUS INJURY—Property situate in Northern Ireland—Shot fired from Irish Free State—*Grand Jury* (*Ireland*) *Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 135 — *Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97), *sect.* 51—*Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5, *sub-s.* 1, *sub-s.* 3.] The applicants were the owners of church property situate in the County of Fermanagh to which malicious injury was done by shots fired from the County of Donegal. *Held*, that the malicious damage was committed in the County of Fermanagh, and that the applicants were entitled to recover against that county. *Fermanagh County Council* v. *Donegal Presbytery Board of Education* ... ... App. (N.I.) 184

MILITARY COURT ... 13, 17
See Habeas Corpus.

MOTOR CAR—Failure to pay licence duty—Authority to prosecute [98
See Licence Duty.

MUTUAL WILL—Grant of probate to survivor 52

See PROBATE—PRACTICE. 1.

NEGLIGENCE—PASSENGER LEAVING OBSTRUCTED FOOTPATH FOR CARRIAGE-WAY INJURED BY NEGLIGENCE OF THIRD PERSON — *Liability of third person — Hoarding erected by licence — Proximate cause — Statutory condition — Breach — Remoteness of damage.*] The plaintiff A, a foot-passenger, whilst lawfully walking on the footpath of a crowded street in the City of Dublin meeting with an obstruction, viz., a hoarding erected by licence of the Corporation by B in front of premises undergoing repair, stepped on to the roadway. She proceeded alongside the hoarding, and when just past it, but before she had time to remount the footpath, was overtaken by a military motor lorry driven by C, and was knocked down and injured. The hoarding when first erected was provided with a footway and hand-rail for passengers passing in front of the premises in accordance with statutory requirements, but these had been removed by B by direction, it was alleged, of a subordinate official of the local authority some years before the date of the accident. In an action by A against B and C for negligence, the jury found that B was negligent in not providing a safe footway for passengers in front of the hoarding, and in not complying with the conditions of the statutory licence authorising the erection of the hoarding, and that such negligence conduced to the happening of the accident; and they also found that C was negligent in going too fast, in not giving notice of his approach, and in not having his lorry under control, and they awarded the plaintiff £2,700 damages. The Judge at the trial entered judgment for C, who, by leave, pleaded the Public Authorities' Protection Act, the action not having been brought within six months of the occurrence. Judgment was entered against B for £2,700. On motion by B for judgment or for a new trial, on the grounds that there was no evidence against him either of negligence or of nuisance, and that the damage was too remote: *Held*, by the Court of Appeal (Moloney C.J. and Ronan L.J., O'Connor L.J. dissentiente), that there being evidence to support the findings of the jury, the plaintiff was entitled to judgment. Per Ronan L.J. (approving of the

NEGLIGENCE—*continued.*

statement in Sir F. Pollock's work on Torts, 11th ed., p. 473): "Where negligent acts of two or more independent persons have between them caused damage to a third, he is entitled . . . to sue all or any of the negligent persons." The terms of the licence and the breach of them were ample evidence of negligence on the part of the defendants. Per O'Connor L.J.: A person placing an obstruction on a footpath, and thereby compelling another to walk out on to a carriageway, does not insure him against injury from the negligence of a third party. The negligence of the third party is the cause of the accident, not the presence of the injured person on the spot where the negligence is operative. *M'Kenna* v. *Stephens and Hull & Co.* ... APP. (I.F.S.) 112

NEIGHBOURING COUNTIES—Apportionment of compensation for malicious injury—Northern Courts have no jurisdiction to apportion on county outside Northern area 54

See MALICIOUS INJURY. 3.

PARLIAMENT — FRANCHISE — RIGHT OF MEMBER OF THE ROYAL ULSTER CONSTABULARY TO VOTE *at an election for members of Parliament of the United Kingdom — Constabulary (Ireland) Act*, 1836 (6 & 7 *Wm.* 4, *c.* 13), *sect.* 18 — *Parliamentary and Municipal Elections Act*, 1872 (35 & 36 *Vict. c.* 33), *sect.* 7 — *Constabulary (Ireland) Act*, 1922 (12 & 13 *Geo.* 5, *c.* 55) — *Constabulary Act (Northern Ireland)*, 1922 — *Invalidity* (12 & 13 *Geo.* 5 (*N.I.*), *c.* 8), *sect.* 1, *sub-s.* 3— *Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *sects.* 14, 15.] The Constabulary (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 13), sect. 18, which enacted that any member of the Royal Irish Constabulary is liable to a penalty of £100 if he votes at an election for a member of Parliament whilst he remains a member of the Royal Irish Constabulary, or within six months after he retires from that force, does not apply to members of the newly formed Royal Ulster Constabulary. *Held* by the Court of Appeal (affirming Wilson J.), that sect. 1, sub-s. 3, of 12 & 13 Geo. 5 (N.I.), c. 8, is ultra vires and void so far as it purports to apply sect. 18 of 6 & 7 Wm. 4, c. 13, to members of the Royal Ulster Constabulary, inasmuch as the Parliament of Northern Ireland has no power to alter the franchise or

PARLIAMENT—*continued.*
election laws relating to the Commons House of Parliament of the United Kingdom (10 & 11 Geo. 5, c. 67, sect. 14, sub-s. 5; sect. 15, sub-s. 1. *Hunter* v. *M'Kinley* APP. (N.I.) 165

PRACTICE — WRIT — INDORSEMENT —AMENDMENT—*Special indorsement—Action for recovery of land—Agricultural or pastoral holding—R.S.C. (Ir.), 1905, Order 3, rule 7.*] In an action for the recovery of possession of a holding within Order 3, rule 7, the plaintiff issued a writ which was not in the form prescribed by that rule. He afterwards applied for leave to amend the writ by adding such words as would make the indorsement a special indorsement within the rule. The application was refused. *Palmer* v. *Palmer* ... K.B.D. (I.F.S.) 154

1. PROBATE — PRACTICE —ORIGINAL WILL ALLOWED TO BE SENT TO SCOTLAND — *Mutual will — Codicil indorsed thereon and subsequent trust disposition — Freeholds in Scotland.*] Two sisters executed a mutual will, leaving everything belonging to the first to die to the survivor, and appointing the survivor executrix. Subsequently they executed a codicil, indorsed on the original will, dealing with freeholds in Scotland, and also a further trust disposition, to take effect on the death of the survivor, revoking the codicil and dealing with the Scotch property, but expressly saving the original will. The Court gave the survivor liberty to apply for a grant of probate of the original will, with liberty to the persons interested in the trust disposition to apply to have the original will and indorsement thereon handed over to the proper Registry Office in Scotland. Form of order. *Cotton, In the Goods of*
[K.B.D. (PROBATE) (I.F.S.) 52

2. PROBATE — PRACTICE — SECURITY FOR COSTS—*Plaintiff next-of-kin and caveator out of the jurisdiction.*] The making or an order that a plaintiff resident out of the jurisdiction shall give security for costs rests solely in the discretion of the Court. In the exercise of such discretion, three elements should be taken into consideration: 1, that an Irish-born subject is entitled to sue as of right; 2, that mere absence does not disqualify him; 3, that the Court should consider all the circumstances. *M'Neany* v. *Maguire*
[K.B.D. (PROBATE) (I.F.S.) 43

PROHIBITION — CERTIORARI — ILLEGAL BODIES ACTING AS COURTS — *Jurisdiction of Court to interfere with orders of such bodies.*] On a motion on notice for a writ of prohibition directed to C. M. and K. O'S. and other, the Judges and Commissioners of the Land Court and Land Settlement Commissioners of Dáil Éireann to prohibit them from proceeding upon or otherwise enforcing certain orders or judgments of the said Land Court and Land Settlement Commission, dated 12th November, 1920, and 14th October, 1922, and for a writ of certiorari to bring up the said orders for the purpose of having the same quashed, on the ground that the said orders were ultra vires and bad on their face: *Held*, that the Court cannot grant a writ of prohibition directed to persons who, without any lawful authority, purport to act as a Court: *Clifford* v. *O'Sullivan* ([1921] 2 A.C. 570) applied. And where, there being no right or duty in the tribunal to decide a matter—its assumption of authority is illegal from the beginning—it is not subject to certiorari. Per Dodd J.: The only Courts that can be restrained by prohibition are Courts established by the Legislature when usurping a jurisdiction of a judicial character not within, or in excess of, powers conferred upon them by the Legislature. Per Samuels J.: These tribunals were in no sense Courts; their decrees were absolutely void in law. There was no Court to prohibit, and no judgment order or record to quash. *R.* (*Kelly and Others*) v. *Maguire and O'Sheil*
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PROSECUTION — Authority for — Failure to pay licence duty—Mechanically propelled vehicle [98
See LICENCE DUTY.

PUBLIC HEALTH — OFFENCES—UNSOUND FOOD—*Sale of fruit unfit for human food—Notice exhibited at stall that sale was on terms that unsound portion should be destroyed by purchaser, and that price was to be deemed as paid for sound portion—Conviction for offence against Public Health (Ir.) Act*, 1878 (41 & 42 *Vict. c.* 52), *sects.* 132 *and* 133; *Dublin Corporation Act*, 1890 (53 & 54 *Vict. c.* ccxlvi), *sect.* 65, *quashed.*] The appellant, a wholesale vendor of fruit intended for the food of man, exposed

PUBLIC HEALTH—*continued.*

for sale at his stall in the Dublin Corporation Market a case of apples known as "Lisbon" apples, which were liable to decay, but the decay could not be detected by visual inspection or handling. A notice in the following terms was exhibited at the appellant's stall:—"All goods ex-warehouse are sold under the condition that the purchaser destroys all unsound fruit. All Fruit and Produce is sold by us, whether by auction or Private Treaty, on the condition that the price paid be regarded by the buyers as the value of the sound goods contained in any package, whether the whole of such contents be sound or only a part thereof; and as regards such of the contents as are spoiled, damaged, or otherwise defective, so as to be unfit for human consumption, such defective goods are not intended by us or purchased by the buyer for the food of man." After the usual market, one Sarah M'Daid, a retailer of apples, purchased the case from the appellant, and the magistrate found as a fact that at the time of the sale and purchase one-third of the apples were unsound. She was aware of the contents of the notice, and on previous occasions had frequently bought fruit subject to its terms. The magistrate convicted the appellant of an offence under sects. 132 and 133 of the Public Health (Ir.) Act, 1878 (41 & 42 Vict. c. 52), and sect. 65 of the Dublin Corporation Act, 1890 (53 & 54 Vict. c. ccxlvi). *Held,* following the decision of the majority of the Court in *The Queen* v. *Dennis* ([1894] 2 Q.B. 458), that the decision of the magistrate was wrong, and that the conviction should be quashed. *Uden* v. *Dunne*

[K.B.D. (I.F.S.) 72

RATES— ASSESSMENT—EVIDENCE OF VALUE — 15 & 16 *Vict. c.* 63, *sect.* 22 — *Rateable value of similar hereditaments in neighbourhood—Admissibility.*] *Held* by the Court of Appeal (N.I.), reversing the King's Bench Division, that the County Court Judge, on an appeal from an assessment of rateable value of premises, should receive evidence tendered as to the rateable value of other premises if it can be shown that by reason of some similarity in conditions their net annual value may assist in determining the net annual value of the premises in question. *Pointer* v. *Norwich Assessment Committee* ([1922] 2 K.B. 471) followed. *Commissioner of Valuation* v. *Galvin* (unreported, Q.B.D., 5 June, 1899) and *Commissioner of Valuation* v. *Anderson* ([1922] 2 I.R. 202) explained. *Ulster Bank, Ltd.,* v. *The Ministry of Finance for Northern Ireland* ... APP. (N.I.) 173

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RECTIFICATION OF LEASE — When made 1, 7
See LANDLORD AND TENANT. 3.

REVENUE—ESTATE DUTY—RATE OF DUTY—57 & 58 *Vict. c.* 30, *sect.* 4; 63 *Vict. c.* 7, *sect.* 12, *sub-s.* 2; 7 *Edw.* 7, *c.* 13, *sect.* 16—*Aggregation of properties — Settled property — Tenant for life exercising general power of appointment.*] D. died in 1875, leaving a will whereby he settled certain estates to the use of B. for life, remainder to the use of her children, remainder to such uses as B. should by will or codicil expressly referring to the power in the will appoint, and in default of appointment by B. to the use of H. for life, with remainders over. B. died without issue in 1920, leaving a will in which she expressly referred to and exercised the power of appointment given by the will of D. *Held,* reversing the judgment of Wilson J. ([1922] 2 I.R. 204), that the power, having regard to the conditions prescribed for its execution, was special and not general, that for the purpose of determining the rate of estate duty payable on the property passing on the death of B. the claim to aggregate the property over which B. had power of appointment with the other property passing on her death failed, and that the estate was "settled estate" within the meaning of 63 Vict. c. 7, sect. 12, sub-s. 2. *In re Dunbar-Buller* ... APP. (N.I.) 143

REVENUE—INCOME TAX—TRADE PROFIT — *Excess profits—Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *sect.* 145, *Case* 1, *Schedule D—Finance Act* (*No.* 2), 1915 (5 & 6 *Geo.* 5, *c.* 89), *sect.* 45, *sub-s.* 5—*Sale of barley requisitioned under Defence of the Realm Acts.*] The appellant company acquired stocks of barley for the purpose of brewing stout. These stocks, under the War Emergency legislation, were requisitioned by the Royal Commission on Wheat Supplies, and disposed of in circumstances which resulted in a profit to the appellants. Income tax and excess profits duty were assessed on these profits, and the

REVENUE—*continued.*

assessments were confirmed by the Special Commissioners for Income Tax. On case stated for the decision of the High Court: *Held* by the Court of Appeal (O'Connor M.R. and Ronan L.J., Pim J. dissentiente), reversing the King's Bench Divisional Court (Molony C.J. and Dodd J.), that the profits in question were not annual profits or gains arising from the trade and business of the appellants, and that the assessments were not properly made. *Mullingar Rural District Council* v. *Rowles* ([1913] 2 I.R. 44) distinguished. *The Glenboig Union Fireclay Co., Ltd.*, v. *The Commissioners of Inland Revenue* (unreported) applied. *Arthur Guinness, Son, & Co., Ltd.*, v. *The Commissioners of Inland Revenue* [K.B.D. (I.F.S.) 186; App. 197

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—— 41 & 42 Vict. c. 52, ss. 132, 133 [72
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1. WORKMEN'S COMPENSATION —ACCIDENT "ARISING OUT OF ... THE EMPLOYMENT" — *Farm labourer engaged in forking hay kicks a detonator — Explosion — Injury — Workmen's Compensation Act*, 1906 (6 *Ed.* 7, *c.* 58), *sect.* 1, *sub-s.* 1.] A farm labourer, whilst engaged in forking hay for his employer, kicked out of his way what appeared to him to be a screw or bolt, but was, in fact, a detonator. The detonator exploded, and the workman sustained injuries which resulted in the loss of the sight of one of his eyes. Some time prior to the accident armed forces opposed to the Government had camped in the haggard, and it was supposed that they had left the detonator in or near the hay. *Held*, that the accident arose out of the employment. *Byrne v. Campbell* ... APP. (I.F.S.) 106

2. WORKMEN'S COMPENSATION —CLAIM— PRESCRIBED TIME—*Seaman — Death by accident — "Within six months after the news of the death" —Workmen's Compensation Act,* 1906 (6 *Ed.* 7, *c.* 58), *sect.* 7, *sub-s.* 1 (*b*); *sect.* 2, *sub-s.* 1 (*b*).] Sect. 7, sub-s. 1 (*b*), of the Workmen's Compensation Act, 1906 (6 Ed. 7, c. 58), enacts that in the case of the death of a seaman the claim for compensation shall be made "within six months after news of the death has been received by the claimant." Sect. 2, sub-s. 1, which enacts that in case of death the claim for compensation must be made "within six months from the time of death," says in proviso (*b*) that "the failure to make a claim within the period . . . specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause." *Held,* that sect. 7 is not self-contained, but that it must be read in regard to the time for the making of the claim in connexion with sect. 2, sub-s. 1 (*b*). A seaman died on January 3rd, 1921, from injury caused by accident arising out of and in the course of his employment. On April 11th, 1921, his widow heard of his death, but was then informed that he had died from heart disease. She did not learn until November 29th, 1921, that the cause of death was injury resulting from an accident. On February 6th, 1922, a claim for compensation was made. *Held,* that the omission to make the claim within six months after "news of the death" had been received by the claimant was not a bar to the proceedings, as the delay was excusable. Per O'Connor L.J.: The date upon which news of the death by injury has been received is the terminus a quo from which the six months are to run. *Foley* v. *Hardie & Co.*
[APP. (I.F.S.) 85

WORKMEN'S COMPENSATION — *continued.*

3. WORKMEN'S COMPENSATION — "CONTRACT OF SERVICE" — *Workman — Quarrying stones for County Council — Paid by the piece — Workmen's Compensation Act,* 1906 (6 *Ed.* 7, *c.* 58), *sect.* 13.] The applicant for compensation was engaged in quarrying stones for a county council. He was paid by the piece, and had to work in a part of the quarry indicated to him by a foreman. The latter measured periodically the quantity of stones quarried. Otherwise there was no interference or intervention on the part of the foreman, and the applicant could work how and when and just as much as he chose. *Held,* that there was no evidence of any contract of employment, and that the applicant was not a workman within the meaning of sect. 13 of the Workmen's Compensation Act, 1906. *Crowley* v. *Limerick County Council*
[APP. (I.F.S.) 178

THE END.

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